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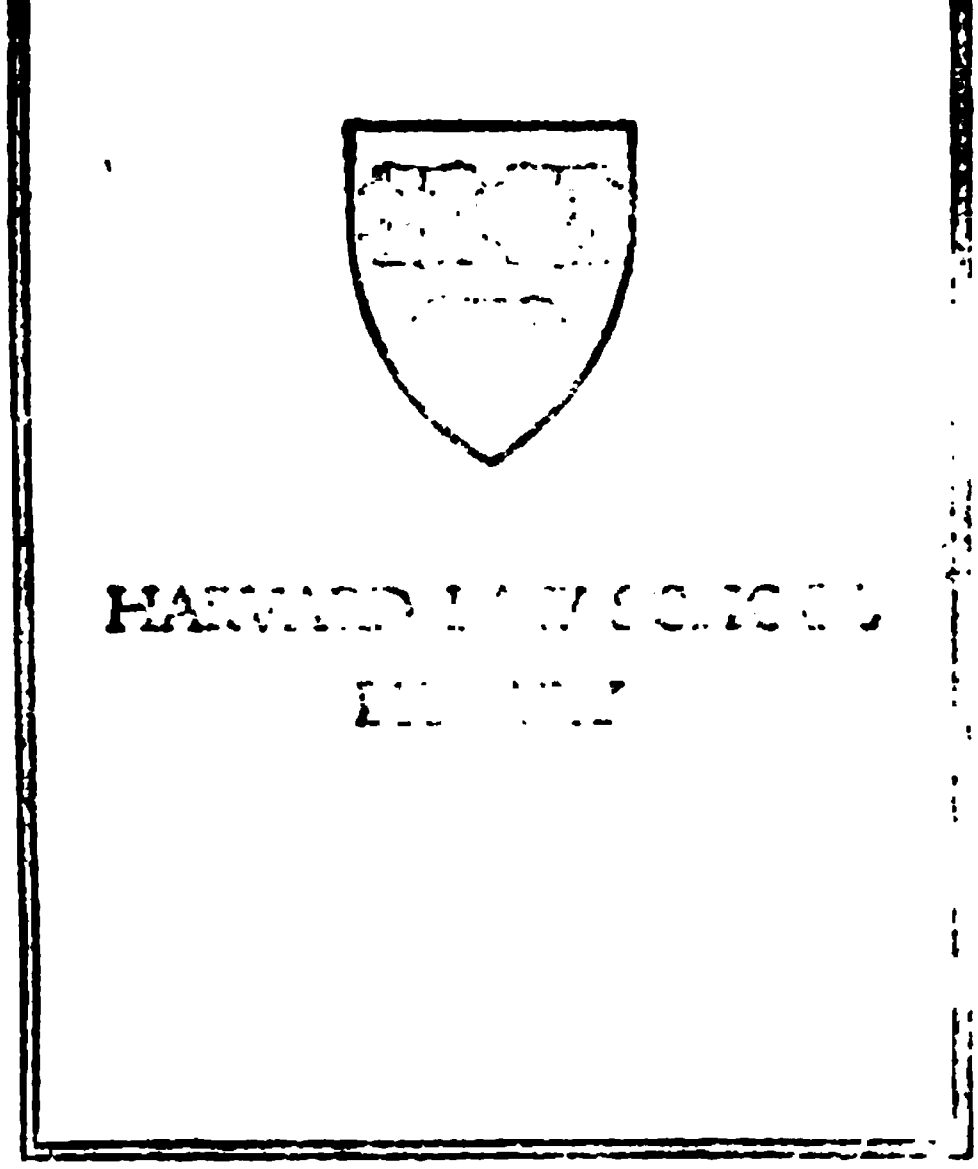

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REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF IOWA.

E. C. EBERSOLE,
REPORTER.

VOL. XVII.

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" JAMES H. ROTHROCK, Cedar Rapids,
" JOSEPH M. BECK, Fort Madison,
" GIFFORD S. ROBINSON, Storm Lake,
" CHARLES T. GRANGER, Waukon,
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REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA,

AT

DES MOINES, MAY TERM, A. D. 1888,

IN THE FORTY-SECOND YEAR OF THE STATE.

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103 279
103 580
75 11
105 410

PRESENT:

HON. WILLIAM H. SEEVERS, CHIEF JUSTICE.
HON. JOSEPH R. REED,
HON. JAMES H. ROTHROCK,
HON. JOSEPH M. BECK,
HON. GIFFORD S. ROBINSON, } JUSTICES.

BARNES V. THE HEKLA FIRE INSURANCE COMPANY.

1. **Continuance**: CHANGE OF ISSUES: SHOWING NECESSARY. A party is not, as a matter of right, entitled to a continuance for the purpose of taking further testimony on account of amendments changing the issues. If he has additional testimony which he desires to take to meet the change of issues, he must so show by affidavit.

2. **Pleading**: ACTION AT LAW: CHANGE TO EQUITY BY AMENDMENT. A party is not estopped, by beginning his action at law, from amending his pleadings before the final submission, so as to change it into an equity action.

3. **Fire Insurance**: POLICY ISSUED BY AGENT: REFORMATION IN EQUITY TO CONFORM TO CONTRACT. An agent of defendant, who had full authority to enter into contracts of insurance for his principal, issued the policy in question. The contract was for insurance on the property to the extent of three thousand dollars in several companies represented by the agent, and the policy in question was for a part of that sum. But the policy in question provided that it should be void if the insured should obtain additional insurance without the written consent of the company. In an action on the policy, wherein the additional insurance obtained under the contract was relied on as a defense, *held* that, because plaintiff relied on the agent to write the policy in accordance with the contract, and failed to read the policy to see if he had done so, he was not guilty of such negligence as to bar him of the right to have the policy reformed so as to express the real contract.

Appeal from Monroe District Court.—HON. DELL STUART, Judge.

FILED, SEPTEMBER 5, 1888.

ACTION on a policy of insurance against loss or damage by fire. Judgment for plaintiff, and defendant appeals.

T. B. Perry, for appellant.

Henry L. Dashiell, for appellee.

SEEVERS, C. J.—This action, as originally commenced, was at law, and a recovery was sought on a policy of insurance. The defendant pleaded that the policy contained the following provisions: "This policy shall be void unless the consent is indorsed in writing by this company in each of the following instances: * * * If the assured have, or shall hereafter obtain, any other policy or agreement for insurance, whether valid or not, on the property insured, or any part thereof." The defendant further pleaded that after the issuance of the policy in question the plaintiff had procured additional insurance on the property insured, and therefore the policy was void. The plaintiff filed an amendment to the petition, alleging that, at the time the contract of insurance was entered into and

the policy issued, it was agreed between the plaintiff and defendant that the former should have the right to take out additional insurance on the property, and that the stipulation for additional insurance was "omitted from the policy by mistake, oversight, and through the fault of defendant;" and a reformation of the policy was asked. The defendant denied the allegations of the amended petition, and also pleaded that the plaintiff, having knowledge of the matters pleaded, was estopped from setting the same up, because he had elected to prosecute an action at law on the policy, and, having made an election of remedies, he was bound thereby, and also because of his negligence in failing to discover the alleged mistake, and therefore he was not entitled to equitable relief. The cause was thereupon transferred to the equity docket, and was tried as such. There was a trial at the February term, 1887, and the cause was submitted to the court upon written arguments to be filed in vacation, the plaintiff waiving the opening argument. At the time of filing a reply to defendant's argument, the plaintiff filed a further amendment to the petition, stating that, at the time the contract of insurance was entered into, the defendant was informed of the intention of plaintiff to take out additional insurance, and verbally assented and agreed thereto. The allegations of this pleading were denied by defendant, and, the cause not having been decided in vacation, the plaintiff insisted upon its immediate submission. To this the defendant objected, on the ground that the issue had been changed since the evidence had been taken, and that it had the right and desired to take evidence in the form of depositions. The court directed the case to be submitted.

I. The defendant contends that the court abused its discretion in ordering the submission of the cause at the time and in the manner it did.

1. CONTINUANCE: change of issues: showing necessary.

Under the practice in this state, as we understand, the defendant was not entitled to a continuance or postponement of the submission of the cause as a matter of right; and this

is what was asked. If the defendant had additional evidence it desired to take and introduce, it should have so shown by affidavit. Failing to do this, the court properly directed the case to be submitted.

II. The defendant contends that, as the plaintiff elected to bring an action at law on the policy, he cannot, by amended pleadings, ask a reformation of the policy, and have the case tried in equity. Conceding that the plaintiff had knowledge of the fact that the defendant asserted that it would rely on the defense it did, still we think he could bring an action at law on the policy, and ascertain certainly whether defendant would plead such defense or not, before resorting to equity. He could not know what the defense would be before it was pleaded. Under the statute in relation to amendments, we have no hesitation in holding that a party is not estopped by bringing an action at law from amending his pleadings before the case has finally been submitted to the court, so as to change it into an action in equity. We feel confident that the universal practice is in accord with this view.

2. PLEADING: action at law: change to equity by amendment.

III. The evidence shows that the policy was issued by one Nelson, who was fully authorized to do so, and he, therefore, had the right to determine the premium, and in fact do all that defendant, or any of its officers, could do in relation to the contract of insurance. We find from the evidence that it was agreed between the plaintiff and Nelson that the former should have insurance on the property to the amount of three thousand dollars. The rate of premiums was agreed upon. The policy sued on was then written and delivered to the defendant, and in a month or two the other policies in other companies represented by Nelson were written and delivered to the plaintiff. That the plaintiff was entitled to and had contracted for such additional insurance is rendered certain, for the reason that Nelson so stated and wrote in a book designated as his insurance register; but he testifies that he failed to so state in the

3. FIRE insurance: policy issued by agent: reformation in equity to conform to contract.

policy. Nelson, as the authorized agent of the defendant, wrote the policy. The plaintiff relied on him to select the companies, and write the policy in accordance with the contract, and we think he had the right to do so; and, because he failed to read the policy and discover the omission therein, and its terms and conditions, he is not guilty of such negligence as will bar him of relief, as the defendant contends. It is true, it was not agreed between Nelson and the plaintiff, in terms, that there should be a stipulation in the policy that the latter had the right to obtain additional insurance, but it does not follow that the policy cannot be reformed, and such provision inserted therein. It was clearly understood or implied that the plaintiff was to have a valid policy of insurance with the right to obtain additional insurance. This was the contract, and whatever provisions were necessary to make it effectual should have been inserted in the policy. Nelson, for the company, impliedly so agreed, and he should have so written the policy. The required provision was omitted by mistake or oversight. Nelson had the power to make such a contract, and he acted in good faith, but simply failed to draft the policy in accordance with the contract. The plaintiff has the right and is entitled to the benefits of the contract, and cannot be deprived thereof through the fault or negligence of the defendant. If the defendant was a natural person, and had entered into the contract, and had written the policy under the circumstances above stated, it seems to us a reformation could not be successfully resisted. For all the purposes of this case, Nelson must be regarded as the defendant. It therefore had notice of the actual contract, and is bound by its terms and conditions. The plaintiff is entitled to a decree reforming the contract, and to a judgment for the amount found due by the district court. The defendant must pay the costs of this appeal.

MODIFIED AND AFFIRMED.

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WEBER V. THE CITY OF CRESTON.

1. **Cities and Towns**: INJURY THROUGH DEFECTIVE WALK: NOTICE OF DEFECT: EVIDENCE. In an action for an injury occasioned by a defective sidewalk which had been built eleven years, the defendant was chargeable with notice of the manner in which the walk was constructed, and there was evidence tending to show that a walk so constructed was, or was liable to become, unsafe. *Held* that a verdict implying that the walk was defective, and that defendant had knowledge of its defects, was not without support in the evidence, though it was shown that no defect was apparent to the ordinary observer at the time of the injury.

2. ——— : ——— : DEFECTIVE CONSTRUCTION: CUSTOM NO DEFENSE. In such case it was no defense that the custom of defendant was to build its walks in the same defective manner as the one in question.

3. ——— : ——— : MEASURE OF DAMAGES. In such case, where the evidence tended to show physical and mental suffering, and that the injury might in some degree be permanent, *held* that plaintiff's recovery was not necessarily limited to the amount that he would have earned during the time lost, and what he paid for medicine, aggregating $47.40, but that a verdict of four hundred dollars could not be interfered with as excessive.

4. ——— : ——— : ——— : INSTRUCTION. In such case the defendant asked the court to instruct the jury that they could allow plaintiff no exemplary damages whatever; only what his time was worth, and any doctor's bills that he may have paid. *Held* that it was properly refused, because, while plaintiff was not entitled to exemplary damages, the instruction did not otherwise properly state the law in regard to the measure of his damages.

5. **Personal Injury**: EVIDENCE. In an action for a personal injury, a non-expert may state such facts as to the appearance of the injury a short time after its occurrence as may aid the jury in determining its extent.

Appeal from Union District Court.—HON. R. C. HENRY, Judge.

FILED, SEPTEMBER 5, 1888.

THIS action was brought to recover for damages sustained by plaintiff and alleged to have been caused by a defective sidewalk for which defendant was responsible. The cause was tried to a jury, and a verdict returned in

favor of plaintiff for four hundred dollars. Judgment was rendered on the verdict, and defendant appeals.

J. B. Sullivan, for appellant.

D. W. Higbee and *J. H. Copenheffer*, for appellee.

ROBINSON, J.—On the sixteenth day of July, 1887, the plaintiff, while walking on a sidewalk of defendant, stepped upon a board, which gave way under his weight, permitting one foot and leg to go through the walk to the ground, some eighteen inches or more below, and causing the injury of which he now complains.

I. The negligence of which defendant is charged consists in constructing the sidewalk, where the accident occurred, in a defective manner, and in permitting the same to become decayed and unsafe. It is claimed on the part of appellant that it had no notice of the alleged defects; that they could not have been discovered with ordinary care, and were unknown to it. It is shown that the walk appeared to be safe and in good condition to the ordinary observer at the time of the accident. The plaintiff had passed over it several times each day for months without observing any defect. Other witnesses had similar experience. We are of the opinion that the liability of defendant must be determined by its knowledge of the manner in which the walk was constructed. It appears that until a time about five years preceding the trial all walks of the kind in question were constructed by laying four-foot boards across the stringers, leaving as pace of about three feet between the stringers, where there was no support for the boards of the walk. Some of the evidence introduced tended to show that this was an improper construction of the walk, and the jury were authorized to so find. The walk had been constructed eleven years or more at the time of the accident. It is alleged in the petition, but not shown, that defendant built this walk. We are uncertain whether the answer was designed to admit or deny this, and the fact alleged does not seem to have been questioned on

1. CITIES and towns: injury through defective walk: notice of defect: evidence.

the trial. But we do not consider this important. The defendant was chargeable with knowledge of the fact that all walks of the width of this one, built prior to 1882, were constructed as this one was, and hence was chargeable with notice that this was defectively constructed. Some of the evidence given tended to show that the walk had been repaired. If this was the fact, defendant would be chargeable with actual notice, and if it was not, then defendant would be chargeable with notice that a walk defectively constructed was liable to be growing more unsafe by use and lapse of time. We think the sufficiency of the walk, and the knowledge on the part of defendant of its defects, were within the province of the jury to determine. *Montgomery v. City of Des Moines*, 55 Iowa, 101; *Rice v. City of Des Moines*, 40 Iowa, 633. We cannot say that the verdict is contrary to the evidence.

II. It is urged on the part of appellant that, if the walks were built in the manner customarily adopted by it, it cannot be held liable. But the fact that the negligence was usual or customary is no defense. *Hosic v. Chicago, R. I. & P. Ry. Co.*, *post*, p. 683; *Hamilton v. Des Moines Valley Ry. Co.*, 36 Iowa, 38.

2. —:—: defective construction: custom no defense.

III. It is claimed that the verdict is excessive. It appears that twenty-seven days elapsed between the time plaintiff was injured and the time he returned to work; that he was receiving $1.20 per day for his labor, and that he paid fifteen dollars for medicine. Appellant insists that the amount of his recovery should be limited to $47.40. But the evidence shows or tends to show that plaintiff lost other time after he first resumed work; that he suffered physically and mentally; that he has not yet recovered from the effects of the accident; and that it is possible that he never will. If this evidence was believed by the jury, it justified the amount of the verdict.

3. —:—: measure of damages.

IV. The defendant asked the court to instruct the jury as follows: "You are instructed that in this action,

4. —:—:—: Instruction. if you find the plaintiff is entitled to any damages at all, you can only give him the actual damages he has sustained. You can allow him no exemplary damages whatever, only what his time is worth, if any, and any doctor's bills that he may have paid." The instruction was refused, and of this appellant complains. There was no error in the refusal of the court to give this instruction, for the reason that it does not express the law. It is true that no exemplary damages can be given in an action of this kind, and the jury might properly have been so instructed; but it is not true that plaintiff's right of recovery is limited to loss of time and physicians' bills. The court properly charged the jury that they might find for plaintiff such an amount as would "compensate him for the personal injury so received, and for his loss of time in endeavoring to be cured, and his expenses necessarily incurred in respect thereto, if any such loss or expense has been proven; and also the pain and suffering undergone by him, and any permanent injury, if any such has been proven." We do not think the failure of the court to frame and give an instruction in regard to exemplary damages ought to be urged as a ground for reversing its judgment.

V. Appellant complains that the court permitted a witness, who was not an expert, to testify as to the appearance of the injury a short time after it was received. The evidence given was as to facts which might aid the jury in determining the extent of the injury; and this we think was permissible.

5. Personal injury: evidence.

VI. Other objections are made and urged by appellant. They are met in part by the views already expressed. We do not think any of them are well grounded, nor do we consider them of sufficient importance to be referred to at greater length.

AFFIRMED.

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d96	422
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104	65
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f 109	9
75	20
111	483
75	20
124	57
75	20
143	396

GLENN *et al.* v. JEFFREY.

1. **Real Estate**: ACTION TO RECOVER: NO TITLE IN PLAINTIFF. In an action to recover real estate, the plaintiff must establish title in himself, and it is not sufficient to show that the defendant has no title.

2. **Public Lands**: SURVEY: MISTAKE IN CALLS. A certain lot was surveyed and platted and located on the north side of a certain water supposed at the time to be the Missouri river; and the government plat and field-notes described the meander line as being at said river, but the water was in fact a bayou some distance from the river, and between it and the river was land which was never in fact surveyed. *Held* that the patent for the lot did not convey the land between the bayou and the river.

3. **Instruction**: AS TO MATTER IN EVIDENCE BUT NOT IN ISSUE: ESTOPPEL. Where no estoppel is pleaded, the court is not required to submit such question to the jury, though there is evidence of facts which would constitute an estoppel.

Appeal from Monona District Court.—HON. C. H. LEWIS, Judge.

FILED, SEPTEMBER 5, 1888.

ACTION to recover possession of real estate on the ground that plaintiffs are the owners thereof. Trial by jury, verdict and judgment for defendant, and plaintiffs appeal.

John S. Monk, G. W. McMillan and *John E. Selleck*, for appellants.

P. Hubbard and *S. H. Cochran*, for appellee.

SEEVERS, C. J.—The court instructed the jury as follows: "The plat and field-notes introduced herein show that lot 3 was surveyed and platted and located upon the north side of certain water, which was at the time of the survey supposed to be the Missouri river. It is shown by the Adkins survey, and other evidence in the case, that lot 3 ran, not to the Missouri river, but to the waters of a certain bayou, and that beyond this bayou, and between it and the Missouri

river, was other land, the land claimed by the defendant. The evidence shows that the land between this bayou and the river was not surveyed. Under this evidence you are instructed that the plaintiff has failed to show title in himself to the land claimed by the defendant. So, though defendant may not have shown any title in himself, still you will sign and return the following verdict, to wit:" The land in controversy is lot 3 in section 18, township 82, range 45, in Monona county, and the plaintiff introduced evidence showing title in himself from the government. The only controversy is whether the lot, as described, extended to the Missouri river.

The evidence warranted the court in giving the instruction it did. There was no controversy as to the facts. It is true that the government plat and field-notes described the meander line as being at the Missouri river, and therefore it is claimed that lot 3 extended to the river. In fact, however, instead of running the meander line along the river, it was run along a bayou some distance from the river. The land in question cannot be regarded as accretion, but existed as it now does when the survey was made. The court rightly directed the jury to find for the defendant. The land never was in fact surveyed by the government, and never sold or conveyed to the plaintiff. It is true, the meander line is not a boundary line (*Kraut v. Crawford*, 18 Iowa, 549), and if the evidence in this case showed that the river had been meandered, this case would be like the case cited; but there is a material distinction between them. In the case cited the river had been meandered and the land in controversy had been formed by accretion since the survey and sale of the land by the government. It is claimed that there was evidence tending to show that defendant leased the land of the plaintiffs, and that therefore he is estopped, and cannot deny the title of his landlord. There was no such issue, and an estoppel was not pleaded, and therefore the court was not required to submit such question to the jury.

AFFIRMED.

DAVIDSON V. THE CENTRAL IOWA RAILWAY COMPANY.

1. **Railroads**: INJURY TO STOCK ON RIGHT OF WAY: NEGLIGENCE: EVIDENCE. Plaintiff was driving his colts along and upon the fenced right of way of defendant's road, when some of them were killed by an approaching train. *Held* that he was guilty of palpable negligence, and that he could not recover in the absence of a showing that defendant's employes were guilty of negligence in not avoiding the injury after discovering the danger.

2. ——— : ——— : SUFFICIENCY OF FENCE. Plaintiff drove his cattle along and upon the fenced right of way of defendant's road, and took down the wires of the fence by unwrapping them from a post at which they all ended, and turned the cattle for the night into an adjacent lot where there was no pasture, and again wound the wires around the posts. That night the cattle re-entered the right of way at that place, and ten of them were killed by a passing train without negligence on the part of those in charge of it. The defendant's employes had, on the day before the cattle were turned in, found the wires unwound from the post at the same place, and securely fixed them, so that they could not be unwound by cattle; but on the morning after the accident they were found unwound, and pushed aside. *Held* that a verdict for the plaintiff could not be sustained on the ground that defendant was negligent in regard to the condition of the fence, nor on the ground that the trainmen were negligent in not sooner discovering the danger and avoiding the injury.

3. **Negligence**: PLEADING: EVIDENCE. Where a recovery is sought on the ground of certain negligence described in the petition, evidence of negligence in some other respect is properly excluded.

4. **Railroads**: INJURY TO CATTLE ON TRACK: CARE OF ENGINEER: INSTRUCTION: VERDICT. In an action for killing cattle on defendant's track, the court instructed that the defendant would be liable if the engineer, "in the exercise of ordinary care, could and should have prevented said accident after he actually saw the cattle on the track." The jury specially found that the engineer "might have seen the cattle sooner." *Held* that, with no other evidence of negligence on defendant's part, a verdict for plaintiff was contrary to said instruction, and could not be sustained.

Appeal from Henry District Court.—HON. H. C. TRAVERSE, Judge.

FILED, SEPTEMBER 5, 1888.

THIS is an action at law to recover damages for killing and injuring certain live stock by trains operated by employes of defendant. There was a verdict and judgment for plaintiff, and defendant appeals.

Anthony C. Daly, for appellant.

Woolson & Babb, for appellee.

ROTHROCK, J.—I. The plaintiff is the owner of a farm of six hundred and forty acres, upon which he keeps a large number of cattle and other live stock. The railroad of the defendant runs through the farm, and the right of way is fenced with posts and barbed wire. There are three private farm-crossings over the railroad; that is, there are three places where gates are erected on each side of the right of way, for the passage of live stock across the track, and for other purposes. The plaintiff claims that, by reason of a defect in the railroad fence, a calf owned by him came upon the track and was killed by a passing train, and that at another time, for the same reason, some of his sucking pigs escaped through the fence and were killed in like manner. The jury found the defendant liable for these casualties, and we do not discover that the defendant was prejudiced by any rulings in regard to these causes of action.

II. In another count in the petition the plaintiff claimed damages for the killing of two colts, not by reason of the want of a fence, but because of the alleged negligence of the defendant in operating the train which caused the injury. The colts did not go upon the railroad track by reason of the want of a fence. The fact is that the plaintiff opened one of the gates at a crossing and left the opposite gate closed, and drove the colts on the right of way, intending to drive them along the right of way to another crossing, and there turn them off the railroad into a field. When he had driven the animals upon the right of way, he discovered a freight train approaching, which ran down upon the colts, and ran

1. RAILROADS: injury to stock on right of way: negligence: evidence.

them into a cattle-guard. The act of negligence which he claims renders the defendant liable is, that the employes of the train did not, after they discovered the colts on the track, use proper efforts to avoid the injury. The bare statement of the fact that the plaintiff drove his colts on the track, not for the purpose of crossing over the railroad, but to drive them along inside the right-of-way fences, shows that he was guilty of most culpable negligence. His sole right to recover is based upon the fact that, notwithstanding his negligence, the men in charge of the train ought to have so managed it, after they discovered the danger, as to have saved the colts from injury. There is a dispute in the abstracts as to the evidence, and an examination of the whole record in the case convinces us that the employes in charge of the train did everything that could reasonably be required of them in the premises. Indeed, we feel well satisfied that there was no warrant in the evidence for finding them guilty of negligence in any respect. We do not deem it necessary to set out the evidence here, but content ourselves with the statement that the verdict upon this cause of action is without support in the evidence.

III. In another cause of action in the petition the plaintiff claimed damages for killing ten cattle, and injuring three others. There are two counts in the petition in reference to these cattle. One bases the right of recovery on the alleged negligence of defendant's employes in operating the train, and single damages are claimed. The other count bases the right of recovery upon the failure of the defendant to properly fence where it had the right to fence, and double damages are claimed under the statute. The facts in reference to this cause of action are, that on August 5, 1886, the plaintiff had about one hundred head of cattle, horses and colts pasturing in a field south of the railroad. In the evening of that day he took these cattle, horses and colts to the north side of the railroad to a forty-acre field, which had recently been mowed, and in

2. ——: ——: sufficiency of fence.

which there was no pasture, in order that they might get water. He opened the south gate of one of the crossings, and, instead of taking the stock over the track and through the north gate, he drove them a little west, and made an opening in the barbed-wire railroad fence at the corner of the forty-acre field, and drove the stock through the opening. There were four wires in the fence, and at the place where the plaintiff made the opening, the posts were about one rod apart. It appears that all of the four wires ended at one of the posts, and the ends were wound around the post and then round the wire. The plaintiff succeeded in making the opening by unwinding the wire. He claims that, after the stock passed through, he wound the wire around the post just as it was before. But the fact remains that some time in the night the stock passed through and upon the track at that place, and early on the next morning a passenger train, running at great speed, ran into the herd, and killed ten cattle, and injured three others. It appears from the evidence that some one opened the fence at the same place on the day before the plaintiff drove his stock through the fence. The evidence is undisputed, and consists of the positive statement of several witnesses, that on the evening of August 4, the fence was open at that place, and that it was safely and securely repaired by the defendant's section-men; and the evidence is equally clear that no stock had ever before this come upon the track at the place where the opening was made. The plaintiff claimed that his cattle escaped from the forty-acre field by reason of the defendant's failure to keep up and maintain a proper fence. The above-recited undisputed facts would rather indicate that if the plaintiff had not made the opening in the fence the accident would not have happened. The plaintiff offered to prove that the opening of the fence was a necessity, because there was a ditch between the railroad track and the north gate, which rendered the crossing defective, and that it was impossible to cross the track at that point. But he did not claim in his petition that the

8. NEGLIGENCE: pleading: evidence.

defendant was chargeable with any negligence in this respect, and the court very properly held that the offered evidence was inadmissible under the issues. The plaintiff did not amend his petition, but proceeded with the trial, and the condition of the crossing was not a material question in the case. We do not hold that one may not, under some circumstances, make an opening in a fence upon a railroad line. There may be facts which will justify such an act upon the ground of necessity. No such state of facts appears from the record in this case, and, in view of the fact that the stock was turned into a place where there was no pasture, and that they went upon the track at the very place where the opening had been made in the fence, and in view of other evidence tending to show that plaintiff had opened the fence at the same place, and left it open, on the fourth of August, there was much ground for finding that the cattle did not come upon the track by reason of any negligence of the defendant in failing to keep up and maintain a sufficient fence. The plaintiff, so far as this record shows, had no right to take down the fence. He claims that it was insufficient; that the wires were not properly spaced; that the lower wire was thirty to thirty-two inches from the ground; and that he put the wires back just as he found them. As he opened the fence when he had no right to do so, he ought to be held responsible for leaving it with the lower wire thirty inches from the ground. On the morning the cattle were killed the lower wires were found not broken, but unwrapped from the post, and pushed aside so as to allow the cattle to pass through. As they were fastened on the evening of the fourth of August, it was a physical impossibility for the cattle to have unwrapped the wire from the post by any pressure upon it, and it follows that the fence could not have been in the same condition it was before the plaintiff meddled with it. We think the verdict cannot be sustained upon the ground of the alleged negligence of the defendant with reference to the condition of the fence; and it cannot be

sustained upon the ground that the trainmen were negligent in running the train after they discovered the cattle upon the track. The evidence shows without conflict that there was no such negligence, and the jury so found in answer to a special interrogatory. It is true that, in addition to an answer to the interrogatory, the jury found that the engineer "might have seen the cattle sooner." Whether this was regarded by the jury as a reason why there should be a verdict for the plaintiff, we cannot determine. If it was so considered, it was contrary to the instructions of the court, by which the jury were explicitly directed that the defendant would be liable if the engineer, "in the exercise of ordinary care, could and should have prevented said accident after he actually saw the cattle on the track." The jury had no right, under this instruction, to wander into the field of inquiry as to what the engineer might have seen.

4. RAILROADS: injury to cattle on track: care of engineer: instruction: verdict.

The jury found specially that the calf and pigs were of the value of fourteen dollars. We find no error as to these claims. The cause will be reversed as to the other claims, and remanded for a new trial. If plaintiff so elects, a judgment may be entered in the court below for the claims for the calf and pigs; the question of costs of the former trial to be determined by the district court.

REVERSED.

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ETTENHEIMER v. NORTHGRAVES *et al.*

PECK *et al.* v. THE SAME.

1. **Innocent Purchaser**: AT EXECUTION SALE: PROTECTION. **A judgment creditor who purchases real estate at a sale under execution, in the absence of notice of an out standing equity, is an innocent purchaser for value, and is entitled to protection as such. (See cases cited in opinion).**

2. **Redemption**: FROM EXECUTION SALE: SUBSEQUENT LIEN: EXTENSION OF TIME. **After land had been sold on execution, but before the year for redemption had expired, certain mortgages were corrected in equity so as to cover the land. *Held* that the mortgagees had a right to redeem under the statute. (Code, sec. 3104). But since they did not avail themselves of that right, nor intimate a desire to redeem until after the year had expired and a deed had been made to the purchaser, *held* that there was no ground in equity for extending the time for redemption, even if the power to do so were conceded.**

Appeal from Adams District Court.—HON. R. C. HENRY, Judge.

FILED, SEPTEMBER 6, 1888.

THE defendant Northgraves executed three mortgages on certain real estate, which were prior liens thereon. Actions were commenced to foreclose such mortgages, and decrees were entered granting such relief. In April, 1886, the defendant Booker obtained a judgment against Northgraves, upon which an execution was issued, and in May, 1886, certain real estate was sold under said execution to said Booker, and a certificate of sale issued to him. In June, 1886, an execution was issued on said judgments of foreclosure, and in July thereafter the real estate described in the mortgages was sold by the sheriff to the plaintiff Ettenheimer, and a certificate of sale issued to him. Afterwards, in December, 1886, the plaintiffs in both actions filed what are designated as amendments to their petitions, in which it was alleged that a mistake had been made in drafting the mortgages; the mistake being in describing

one parcel of real estate, it being the same parcel purchased, as above stated, by Booker, so that the mortgages, on their face, were not liens thereon, although the parties intended they should be. The relief asked was that the original actions might be reviewed, the mistakes in the mortgages, and sales under the decrees of foreclosure, and certificates of sale issued in pursuance thereof, corrected, and the lien of the mortgages, by a proper and sufficient decree, established, to be in force from the date of the mortgages. Such being a general statement of the claim of the plaintiff, the defendant filed an answer, denying the material allegations of the petition. The district court refused to grant the relief asked, and the plaintiffs appeal.

Maxwell & Dale, for appellants.

Davis & Wells, for appellees.

SEEVERS, C. J.—I. It will be conceded that the plaintiffs have established the claimed mistake in drafting the mortgages. One material question discussed by counsel is whether Booker had notice or such knowledge of the mortgages and of the mistakes prior to his purchase at sheriff's sale as to put him on inquiry. There is some evidence that tends to show that he had. But, after a careful reading of the evidence, we unite with the court below in the conclusion that the plaintiffs have failed to establish such proposition by a preponderance of the evidence. The evidence which has such tendency is not so direct, certain and satisfactory as to overcome the denials of Booker and Wills, who testify that, while they had knowledge of the mortgages, they did not have any knowledge of the mistake in describing the land.

II. It is insisted that Booker is not an innocent purchaser. He was a judgment creditor, and purchased at a sale under an execution issued on his judgment. As he bid the full amount of his judgment, it was thereby satisfied of record. As there are no controlling equities,

1. INNOCENT purchaser: at execution sale: protection.

we feel bound by the prior decisions of this court, in which it has been several times held that a judgment creditor, who purchased real estate at a sale under execution, in the absence of notice of an outstanding equity, is an innocent purchaser for value, and entitled to protection as such. *Evans v. McGlasson*, 18 Iowa, 150; *Halloway v. Platner*, 20 Iowa, 121; *Gower v. Doheney*, 33 Iowa, 36; *Weaver v. Carpenter*, 42 Iowa, 343.

III. Plaintiffs insist that they are at least entitled to redeem from the sale to Booker. A decree was entered in this proceeding, in January, 1887, making the requisite correction in the mortgages, which certainly became a lien on the land in controversy at that time; and as the statutory right to redeem had not expired, the plaintiffs, as a matter of right, were entitled to redeem under the statute. Code, sec. 3104. They declined to avail themselves of such right, nor did they, until the first day of June, 1887, which was after Booker was entitled to and had obtained a sheriff's deed conveying the premises in controversy to him, ask for or intimate that they desired to redeem. Conceding that the power exists to extend the period allowed by statute to redeem, there are no circumstances in this case which will justify us in so doing. AFFIRMED.

2. REDEMPTION: from execution sale: subsequent liens: extension of time.

COFFIN V. EISIMINGER.

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1. **Appeal:** WHEN IT LIES: ORDER IN PROBATE. An order in probate directing a guardian to pay over the amount of a judgment rendered against him as garnishee in a suit against his ward, is a final order involving a substantial right, from which he may maintain an appeal to this court. (Code, sec. 3164).

2. **Procedure:** TO COLLECT JUDGMENT AGAINST GUARDIAN: ORDER IN PROBATE. Plaintiff, in a suit by attachment against defendant's ward, had procured judgment in the district court against defendant, in his capacity as guardian, as garnishee. Afterwards, defendant having failed to pay the judgment, plaintiff in the same court, acting as a court of probate, procured an order commanding defendant as guardian to pay the judgment. *Held* that this was a proper method of collecting the judgment.

3. ——— : ——— : ——— : LIMITATION OF TIME : CODE, SECTION 2521. It is no objection to such procedure that the application to the court of probate was made in less than fifteen years after the rendition of the judgment, for such application was not an action upon the judgment within the meaning of section 2521 of the Code, prohibiting actions on judgments of courts of record within fifteen years after their rendition.

Appeal from Mahaska District Court—HON. J. K. JOHNSON, Judge.

FILED, SEPTEMBER 6, 1888.

PLAINTIFF brought an action against the ward of defendant, aided by attachment. The original notice was served by publication, the defendant was garnished, and judgment was rendered for the sum of $107.55 and costs against the attached property. At the same time judgment was rendered in favor of plaintiff and against the garnishee for the same amount, the ward having been duly served with notice of the garnishment proceedings. The plaintiff afterwards filed an application in probate for an order requiring defendant to pay the amount of the judgment rendered against him as aforesaid. The application was heard by the court, and an order made as prayed. From this order the defendant appeals.

Searle & Scott and *Liston McMillen*, for appellant.

Robt. Kissick, for appellee.

ROBINSON, J.—I. The appellee has filed a motion to dismiss the appeal for the following reasons: (1) Because no appeal lies from the order made in this cause; (2) because, the facts being conceded, the order made does not affect any substantial right of the appellant; (3) because the rights of appellant are in no way affected by said order." This is a proceeding to enforce the payment of a sum of money which has been adjudged to be due in an action brought for that purpose. The order was a final one, and required appellant to pay over

a given sum of money within a time fixed in the order. We think this involved a substantial right, from which an appeal may be taken. Code, sec. 3164. The motion to dismiss is therefore overruled.

II. Appellant insists that there is no authority in the law for this proceeding; that it can afford no relief which the judgment against him had not already given; that it imposes an unnecessary burden upon the ward; and that no authority to institute it is shown. The district court now has original and exclusive jurisdiction of the persons and estates of those who require guardianship. Code, sec. 2312; Laws 1886, sec. 8, ch. 134. Guardians of the property of their wards manage their interests under the direction of the court. Code, secs. 2250, 2274. All money should be paid out under the direction of the court. *Bates v. Dunham*, 58 Iowa, 310. It may be said that the court had already ordered the payment of this money in the garnishment proceedings by the rendition of a judgment therein; hence that the order made in this proceeding is a useless form. It is true that the same court rendered the judgment and made the order, but in one case it was acting as a court of general civil jurisdiction, while in the other it was acting as a probate court. In the first case the probate jurisdiction was neither invoked nor exercised. It was necessary for the probate court at some time to act upon the matter of using money to pay the judgment. Whether this could have been anything more than a matter of form, in view of the fact that judgment had already been rendered, we need not determine. It was the duty of the guardian to pay the judgment under the direction of the probate court. He failed to pay the judgment, and neglected to ask the instruction of the probate court in regard to it. Under these facts it was proper for plaintiff to obtain an order to compel the guardian to perform his duty. It may be that this was not necessary, and that ample relief might have been obtained by other means; but we regard it as one of the methods authorized by law for the collection of the judgment; and the record fails to disclose any fact which makes it improper in this case.

III. The judgment against the guardian was rendered on the sixth day of June, 1887. It is insisted by appellant that this proceeding cannot be maintained for the reason that section 2521 of the Code forbids the bringing of an action upon a judgment rendered by a court of record within this state within fifteen years after the rendition thereof, without leave of the court, and that such leave is not shown in this case. This is not an action within the meaning of that section, but is in the nature of a special proceeding auxiliary to the judgment. We discover no error in the record.

AFFIRMED.

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SCHRIVER V. HOLDERBAUM.

HOCHSTETTER V. THE SAME.

Estates of Decedents: CLAIMS AGAINST: STATUTE OF LIMITATIONS. Claims against an estate, based on promissory notes, were made up and approved by the executor and filed with the clerk within six months after notice of the appointment of the executor, but no formal approval of the claims was made of record by the clerk, and no order of approval was made by the court. The executor made partial payments, and he and the claimants seem to have thought that nothing further was necessary to be done to authorize payment in full. Seven years later the claimants appeared and were allowed to prove up the claims. *Held* that they were authorized so to do—the claims being of the third class, as defined by sections 2420 and 2421 of the Code, and therefore not barred by a failure to prove them up within twelve months from notice of the executor's appointment, and no prejudice to the estate having been shown on account of the delay in proving them up. (Compare *Smith v. McFadden*, 56 Iowa, 482).

Appeal from Madison District Court.—HON. O. B. AYRES, Judge.

FILED, SEPTEMBER 6, 1888.

Schriver v. Holderbaum.

THESE proceedings involve the validity of certain claims against the estate of Michael Holderbaum, deceased. The district court held said claims to be valid, and approved the same, and the executor of Holderbaum appeals.

Parsons & Perry and *T. C. Gilpin*, for appellant.

V. Wainwright and *J. Leonard & Son*, for appellees.

ROTHROCK, J.—I. It appears from the record in the case that Michael Holderbaum died on the twenty-fourth day of June, 1879, having made his last will and testament, in which the defendant, A. C. Holderbaum, was named as executor. The will was admitted to probate, and the executor qualified on the tenth day of November, 1879. The claims in controversy consisted of promissory notes executed by the deceased. Claims against the estate were made up which contained copies of the notes, and these claims were verified and approved as correct by the executor, in writing thereon, on the thirtieth day of December, 1879. They were filed by the clerk of the court on the first day of January, 1880. No formal approval of the claims was made of record by the clerk, and no order of approval was made by the court. The executor proceeded with the settlement of the estate. The owners of the claims were non-residents of the state, and it appears that the executor made payments on the claims; and by his correspondence with the claimants they and the executor appear to have thought that no further action was necessary to be taken to authorize the executor to pay them in full. He made several progressive reports, and on February 14, 1887, he filed what was denominated a "final report," in which he ignored the claim in controversy, and asked that the estate be declared settled, and that he be discharged.

The claimants filed objections to the report, in which they set forth the facts attending their filing and approval by the executor. The executor filed a motion to strike the exceptions from the files, which motion was overruled. The exceptions were then demurred to, and the

demurrer was overruled. Thereupon the claimants filed motions for the allowance of their claims. These motions were heard upon evidence, and the court allowed the claims as of the third class, as they are denominated in sections 2420 and 2421 of the Code. The claims were filed within six months after the first publication of the notice given by the executor of his appointment. The court did not regard the approval of the executor as sufficient to bring them within the fourth class, and they were therefore not barred because not approved within twelve months of the giving of the notice.

The case is very much like *Smith v. McFadden*, 56 Iowa, 482, where it was held that a claim of the third class is not barred because not proved up until after the expiration of twelve months from notice of appointment of an administrator, and that a delay to bring a claim on for hearing will not operate as a bar or estoppel to prevent it being proved, unless the estate has been prejudiced by the delay. The court in the case at bar had complete jurisdiction of the parties. The claims were filed in proper time, and indorsed "Approved" by the executor. Both the parties were before the court from the time the claims were filed until the formal approval from which this appeal was taken. Not only this, but payments were made upon the claims as though they had been allowed. The original promissory notes, the foundation of the claims, were introduced in evidence upon the hearing; and there is no showing that the estate has been prejudiced by the delay. And we doubt very much whether, under the facts of this case, the parties being in court, any delay would operate as a bar or estoppel.

AFFIRMED.

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COLLINS V. STORM.

1. **Tax Sale and Deed:** NEWLY ORGANIZED COUNTY: TAXES LEVIED AND DELINQUENT BEFORE ORGANIZATION. Taxes on land now in O'Brien county were levied by Woodbury county and had become delinquent while O'Brien county was yet attached to Woodbury county for revenue purposes. *Held* that a sale of the land for those taxes by O'Brien county, after its organization, was without authority and void. (*Hilliard v. Griffin*, 72 Iowa, 331, *followed*).

2. ———: FATALLY DEFECTIVE DESCRIPTION. A tax deed describing the land conveyed as "the west fract. ½ quarter of the N. W. quarter of section 7, in township 96 north, of range 41 west," is too indefinite to convey any part of the west half of said northwest quarter section; and in an action against the holder of such deed to quiet the title without asking for a reformation of the deed, the word "quarter," when it first occurs, cannot be treated as surplusage.

3. ———: VOID SALE: ACTION TO QUIET TITLE: DECREE AS TO TAXES PAID AND IMPROVEMENTS. In an action to quiet the title of land against the holder of a void tax deed, where the plaintiff offers to pay defendant the taxes paid by him on the land, with six per cent. interest, a decree for plaintiff should be accompanied with an order for such payment, but, since such action is not to redeem from a valid sale, but to quiet title, the question as to compensation for improvements must be adjudicated in a subsequent action under the statute as to occupying claimants. The case is not governed by section 893 of the Code.

Appeal from O'Brien District Court.—HON. SCOTT M. LADD, Judge.

FILED, SEPTEMBER 6, 1888.

PLAINTIFF brought an action to quiet in him the title to a tract of land. Defendant pleaded that he owned the land, and in a cross-petition prayed that his title be quieted against the claim of plaintiff. The district court dismissed the petition, and entered judgment granting defendant the relief demanded in the cross-petition. Plaintiff appeals.

H. E. Long, for appellant.

J. A. Stocum, for appellee.

REED, J.—The land in controversy is the west half of the northwest quarter of section 7, in township 96 north, range 41 west. Plaintiff claims under a patent from the government of the United States. Defendant claims under two tax deeds by the treasurer of O'Brien county, the first of which was executed to Charles C. Orr, June 28, 1866, under an alleged sale in 1860 for the taxes of 1858 and 1859. The other was executed to T. J. Stone on the twenty-eighth of December, 1870, under an alleged sale in 1867 for the taxes of 1866.

I. The facts with reference to the sale under which the first deed was executed are like those in *Hilliard v. Griffin*, 72 Iowa, 331. When the taxes accrued, the territory of O'Brien county was attached to Woodbury county for revenue and other purposes. The treasurer of O'Brien county, therefore, had no authority, after the organization of that county, to collect the taxes, and there was an absolute want of power to make the sale. The attempted sale was therefore an absolute nullity, and no right could accrue under the deed executed in pursuance of it.

1. TAX sale and deed: newly organized county: taxes levied and delinquent before organization.

II. The description contained in the deed of 1870 is as follows, viz.: "The west fract. 1-2 quarter of the N. W. quarter of section 7, in township 96 north, of range 41 west." This description is as uncertain and indefinite as it possibly could be made. It does not describe the land in question, nor can it be said that it includes any particular part of it. The west one-half quarter of the quarter section might be regarded as a good description of the west one-eighth of it, and might be held to include and cover the west one-fourth of the tract in question. But the description is the west fractional one-half quarter, and the extent of the fraction is not stated. It is impossible to determine, therefore, whether it was

2. —: fatally defective description.

intended to cover a fraction of one acre, or nineteen acres and a fraction. It is clear only that something less than twenty acres was intended, but how much less is entirely uncertain. It was contended, however, that the word "quarter" occurring first in the description should be treated as surplusage, and rejected. But we cannot do that in this action. The action is not for the reformation of the deed, but for the quieting of title under it; the question being whether, under the deed as it appears, the title of the former owner of the property has been defeated or extinguished. We think it entirely clear that defendant is not entitled to the relief granted him by the judgment. The judgment will, therefore, be reversed, and judgment will be entered, either here or in the district court, dismissing the cross-petition, and quieting the title in plaintiff upon the payment by him of the taxes on the property paid by defendant, with six per cent. interest, he having made an offer in his reply to pay the same. Defendant is in possession and has made improvements on the land. But as the action is not to redeem from a valid sale, but to quiet title, the questions as to the improvements must be adjudicated in a subsequent action. The case in that regard is not governed by section 893 of the Code, but falls within the general statute as to occupying claimants. Ch. 7, tit. 13. REVERSED.

3. —— : void sale : action to quiet title : decree as to taxes paid and improvements.

McClure v. Braniff *et al.*

1. **Homestead:** CONVEYANCE: DEED TO SECURE MONEY ONLY. A deed of a homestead designed only to secure a loan from the grantee, the grantors continuing in possession, does not divest the grantors of their homestead rights.

2. ——: FORFEITURE BY USE FOR UNLAWFUL SALE OF INTOXICATING LIQUORS. Where a homestead owned by a husband is used by him for the unlawful sale of intoxicating liquors, it becomes liable for fines, costs and judgments rendered against him on account of such unlawful conduct; and, the title being in the husband, it makes no difference that such use of the homestead is without the consent and against the will of the wife. (See cases and statutes cited in opinion).

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3. ——: TITLE IN HUSBAND: WIFE'S RIGHT TO PROTECT. In an action against a husband, who has the title to the homestead, to subject it to the payment of a judgment, the wife has such an existing interest as to entitle her to intervene for the protection of the homestead, regardless of whether her husband asserts the homestead right or not. (See cases cited in opinion).

4. **Intoxicating Liquors**: UNLAWFUL SALE: LIEN ON REAL ESTATE: SALE AFTER ACTION BEGUN: NOTICE: PRIORITY. Where one takes a deed or mortgage upon real estate after an action has been begun against the owner for the unlawful sale of liquors on the premises, a judgment in which action would be a lien on the real estate under section 1558 of the Code, the grantee or mortgagee takes subject to the lien of any such judgment afterwards rendered. (*O'Brien v. Putney*, 55 Iowa, 292, *followed*, and *Bonesteel v. Downs*, 73 Iowa, 685, *distinguished*).

5. ——: NUISANCE: DUTY OF COURT TO ORDER ABATEMENT. In an action to restrain and abate a liquor nuisance, where a nuisance is found and enjoined, it is error for the court to refuse an order for its abatement. (See statutes and cases cited in opinion).

Appeal from Dallas District Court.—HON. A. W. WILKINSON, Judge.

FILED, SEPTEMBER 6, 1888.

ACTION to restrain the keeping and for the abatement of a nuisance, commenced on the thirteenth day of January, 1886. On that day plaintiff filed his petition, in which he alleged that Barney Braniff was the owner of lot 20, block 38, in Dallas Center; that he had established, and was maintaining in a building on said lot, a place for the sale of intoxicating liquors, contrary to law; and asking for such relief as was authorized by law. A temporary writ of injunction was issued. March 2, 1887, plaintiff filed an amendment to his petition, in which he alleged that on February 13, 1886, defendant Braniff had sold and conveyed the lot aforesaid to one L. L. Collins; and asking that he be made a party to the action, and asking equitable relief against him. Collins filed an answer to the petition as amended, and therein admitted a conveyance to himself of the property in question; but alleged that, while the instrument of conveyance was in form a deed, yet it was designed to secure the payment of money to the amount

of three hundred and fifty dollars, which he had advanced to Braniff to pay the balance of the purchase price of said property. A demurrer to that part of this answer which set out the character of the interest claimed, was sustained. Collins afterward filed an amendment to his answer, in which he alleged that, by the payment of the money for Braniff as claimed, he should be subrogated to the rights of the vendor to a lien. May 11, 1887, Mary S. Braniff, the wife of Barney, filed a petition of intervention, in which she alleged that the premises in question were occupied by herself and husband as a homestead from October, 1882, to January, 1884; that, from about the date last mentioned, her husband commenced using a portion of the building as a place of business, and continued to so use the same up to March 1, 1887; that the value of that portion of the building so used did not exceed three hundred dollars; that, if her husband kept for sale or sold intoxicating liquors therein contrary to law, it was without her consent, and against her protest. She asks that her homestead right be protected. Plaintiff filed an answer to this petition of intervention, in which he denied that the premises in question were a homestead; setting out the conveyance to Collins, and asking relief against intervenor. Defendant Braniff appeared, but does not seem to have filed any pleading. The cause was tried in June, 1887, and a decree rendered restraining Braniff from selling or keeping for sale intoxicating liquors in the building situated on the lot described in the petition, and adjudging him to pay an attorney's fee of one hundred dollars and costs. The court found that the interest of Collins was not affected by the proceedings, and provided that the judgment for attorney's fee and costs should not be a lien on the premises in controversy. The plaintiff appeals.

D. W. Woodin, for appellant.

M. H. Baugh, for appellees Collins and Mary S. Braniff.

ROBINSON, J.—We are satisfied by the evidence that the interest of Collins in the premises in controversy is that of a mortgagee acquired during the pendency of the suit, and that intervenor and her husband have a homestead right in the premises. The business carried on by the husband was that of a grocer and restaurant keeper, but the evidence shows clearly that he kept and sold in two rooms of the building in question intoxicating liquors, contrary to law, and that intervenor had knowledge of that fact. The building is about sixteen feet wide, forty feet long, and one and one-half stories in height. The first story is divided into three rooms and a stairway. The front room was used exclusively for the business of the husband; the middle room was used chiefly for this business, but was also used in part for family purposes; the back room was used as a kitchen and living room; and the upper story was used exclusively for family purposes. A walk along the outside of the building leads from the street in front to two doors, one of which opens into the kitchen, and the other to the stairway which leads to the second story.

I. The appellant contends that, by reason of the conveyance to Collins, Braniff and wife lost their homestead right in the premises conveyed; but, as we have stated, the conveyance was designed to be a mortgage. Hence the homestead rights of the husband and wife were not thereby affected. The legal title of the premises was in Barney Braniff prior to the conveyance to Collins, and in law he is still the owner.

1. HOMESTEAD: conveyance: deed to secure money only.

II. The next question which we need to determine is the liability of the premises, or of any part thereof, for the payment of the judgment for attorney's fees and costs. It is well settled that a part of a building may be subjected to the payment of a judgment against the owner, while the remainder would be exempt as a homestead. See *Arnold v. Gotshall*, 71 Iowa, 572, and cases therein cited. In our opinion, the front and middle rooms were

2. —: forfeiture by use for unlawful sale of intoxicating liquors.

so far devoted to business purposes as to lose the homestead character, except as they are to be deemed appurtenant to the homestead, within the meaning of section 1997 of the Code. *Smith v. Quiggans*, 65 Iowa, 637. In *Arnold v. Gotshall*, it was held that the homestead used for the sale of intoxicating liquors contrary to law, with the knowledge and consent of the wife, who was the owner of the property, was subject to the payment of a judgment recovered by reason of such illegal sale. But it is claimed, on the part of the appellees, that it is shown that intervenor did not consent to the illegal acts in this case; that she was opposed to them; and, in one instance, caused the arrest of her husband on account of them; and therefore that the rule of the case last cited does not apply. It is further urged, in this connection, that the homestead of the family is exempt, and that the husband cannot, by acts to which the wife is opposed, subject the homestead to the payment of debts; that to so hold would authorize a violation of the law, designed for the protection of the family, by indirect means. Section 1988 of the Code is as follows: "Where there is no special declaration of the statute to the contrary, the homestead of every family, whether owned by the husband or wife, is exempt from judicial sale." Section 1558 provides that, "for all fines and costs assessed or judgments rendered, of any kind, against any person," for any violation of the provision of the chapter in regard to the sale of intoxicating liquors, "the personal and real property, except the homestead as now provided by law, of such person, as well as the premises and property, personal or real, occupied and used for that purpose, with the consent and knowledge of the owner thereof, * * * shall be liable; and all such fines, costs, or judgments shall be a lien on such real estate until paid." This provision was held, in *Arnold v. Gotshall*, to be a special declaration of the statute, within the meaning of section 1988. The homestead is made liable by reason of the illegal occupation or use, which is "with the consent and knowledge of the owner." In this case the owner is the husband. *Burns*

v. Keas, 21 Iowa, 257. The consent by the wife is not required when the husband is the owner. It may be that this consideration of the law will in some cases cause a loss of homestead rights, and lead to hardships; but, if so, it is beyond our control. We must interpret the law as we find it. The general assembly may have thought it better to make the homestead liable in such cases than to permit the homestead right to operate as a shield for the protection of the offender against the consequences of his wrongful acts.

III. It is contended by appellant that, since the husband has not claimed the property in controversy as exempt under the homestead law, the wife cannot maintain her petition of intervention; especially as she does not allege therein that the husband refuses to assert the exemption. But in this view we do not concur. The interest of the wife in the homestead is an existing, and not merely a contingent, right. *Adams v. Beale*, 19 Iowa, 66. It has been held that, after the right is once acquired, the husband cannot defeat it by abandonment, so long as the wife continues to occupy it as a homestead. *Lunt v. Neeley*, 67 Iowa, 100. The wife may protect her homestead right by redeeming from a tax sale of the homestead. *Adams v. Beale, supra.* Her right being actual and existing, she is entitled to protect it through the means adopted in this case.

3. —: title in husband: wife's right to protect.

IV. Appellant claims that, the interest of Collins having been acquired during the pendency of this action, it is subject to the judgment against Braniff. Collins claims that a sale of the premises, or of any part of them, must be made subject to his interests; and in support of his claim cites the case of *Bonesteel v. Downs*, 73 Iowa, 685. What we decided in that case was that the statute gave no lien prior to the rendition of the judgments, and hence that, according to a settled rule of law, an injunction would not lie to restrain the alienation of property used in the illegal traffic. No attempt was made to overrule the case of *O'Brien v.*

4. Intoxicating liquors: unlawful sale: lien on real estate: sale after action begun: notice: priority.

Putney, 55 Iowa, 292, where this court, in effect, held that, while the lien does not attach until judgment is rendered, yet the right to a lien cannot be defeated by a conveyance of the property pending litigation to enforce it. The statute provides that the property occupied or used for the illegal purpose shall be liable for the payment of judgments. The right to the lien is created by the unlawful act, and it is enforced by means of a judgment. Collins obtained his conveyance to the property in controversy a month after the filing of the petition in this case, and is therefore chargeable with notice of plaintiff's right to a lien for any judgment he might obtain in the further prosecution of the cause. The claim that he is entitled to be subrogated to the rights of the holder of the mortgage, which was paid by the money he furnished, is not sustained by the evidence, and we do not understand his counsel to urge that it is.

V. Appellant complains of the refusal of the district court to provide in the decree for the abatement of the nuisance. The decree should have so provided. Laws 1886, p. 82: *Drake v. Jordan*, 73 Iowa, 707: *McLane v. Bonn*, 70 Iowa, 753. A decree will be entered in harmony with the views we have expressed.

5. —: nuisance: duty of court to order abatement.

MODIFIED AND AFFIRMED.

DAVIS & SONS v. SWEENEY *et al.*

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Sale of Machine: DELIVERY WITHOUT AGREED PAYMENT: FAILURE TO WORK: RETURN: ACTION FOR PURCHASE PRICE. By a written executory contract plaintiffs agreed to deliver to defendants a machine, and defendants agreed, upon such delivery, to execute their notes for the purchase price. The contract contained warranties of the machine, but provided that they should be of no effect if the notes for the purchase price were not made upon delivery. The delivery was made through the plaintiffs' agent, but defendants did not then make the notes, because the agent directed them to first try the machine and see whether it was satisfactory. They found it to be worthless for the purpose for which it was made and purchased, and promptly returned it to the agent, and notified plaintiffs. In an action upon the written contract for the purchase price, *held* that, since defendants discovered, before executing the contract on their part (by making their notes), that the machine was worthless, and thereupon returned it, they were absolved from their obligation to execute the notes, and were not liable for the purchase price.

Appeal from Dubuque District Court—HON. D. J. LENEHAN, Judge.

FILED, SEPTEMBER 6, 1888.

THIS is an action to recover the contract price of a threshing-machine alleged to have been sold by the plaintiffs to the defendants. A demurrer to the answer was sustained, and the defendants appeal.

McCeney & O'Donell, for appellants.

J. C. Longueville, for appellees.

ROTHROCK, J.—A written order was executed by the defendants for a machine to be delivered by the plaintiffs at Washington Mills, Iowa. The order appears to be in the same form as the order of *Davis & Sons v. Robinson*, 67 Iowa, 356. It appears from the order that

the defendants were to make settlement before delivery, by giving their promissory notes for the purchase price of the machine. The machine was to be shipped to Washington Mills from Davenport, Iowa, but the order does not name the consignee. The order contains this provision: "Settlement to be left in the hands of A. L. Gross, Washington Mills, Iowa, until warranty is fulfilled."

The contract was one of warranty, which was in writing, by which the machine was warranted to be well made, of good materials, and, with proper management, capable of doing first-class work. There were the usual provisions for a fair trial of the machine, and for notice to the plaintiffs, if it did not work well, and for a reasonable time to get to the machine to remedy the defects, with the necessary and friendly assistance clause; and that, if the machine could not be made to do good work, to be returned to the place where received, and a new machine given in its place, or the notes would be returned. The warranty contains this further provision: "It being understood and agreed that if purchaser does not make full settlement with cash or approved notes for the machine, upon its delivery to him, he thereby waives all claims under this warranty. (No agent has authority to change the above warranty.) There is no verbal agreement or condition to this sale."

It is alleged in the petition that the machine was shipped to Washington Mills, and the possession thereof delivered to the defendants, and that they converted the same to their own use, but did not execute the notes for the purchase price; and judgment is demanded therefor. The answer to this petition was in these words: "Defendants, in answer to petition of plaintiffs in above-entitled cause, say: They admit the giving of the order set out in the petition, but deny that the plaintiffs complied with said order, and say that plaintiffs did not send said machinery to them at Washington Mills, but sent the same to plaintiffs' own agent, one H. L. Gross, who then delivered the same to these defendants, and also handed them the notes and mortgage referred to in said order,

and said agent then verbally directed these defendants to try said machinery, and, if the same was satisfactory, to then sign and deliver to him the notes and mortgage; that, in compliance with the directions so given by plaintiffs, these defendants took the machinery, and made trial of the same, so as to ascertain that the same was as represented by the agent who procured the order, and capable of performing the work for which it was ordered; that these defendants did try said machinery at once, and ascertained that the same was not as represented by the agent who procured the order, and was wholly unfit to perform the work for which it was ordered; or the work for which such machinery is made, but was wholly unfit to perform the work for which plaintiffs knew these defendants had ordered the same; that, as soon as these defendants ascertained that said machinery was worthless, they gave the plaintiffs written notice, and required them to come and remedy such defects, and they then sent their agent for the purpose of remedying the defects, but he failed to make the machinery work, and abandoned all efforts to do so; that thereupon these defendants returned the machinery in ten days to said agent, at Washington Mills, from whom it was received, and refused to accept the same as being in compliance with said order, and also notified said plaintiffs in writing. Defendants further say that in no way or manner have they taken or used said machinery other than as above stated, nor have they in any manner exercised any control over the same since they returned the same to said plaintiffs' agent."

The demurrer to the answer was as follows: "Now comes the plaintiff, and demurs to the answer of defendants ou the following grounds: *First.* Because said answer does not constitute a defense to the plaintiff's petition, because plaintiff sues on a written contract, which is admitted by the answer, and the facts stated in the answer undertake to vary, contradict and alter the terms of said written contract by prior, contemporaneous and subsequent parol agreements. *Second.* The defendants' answer admits the execution and delivery of the

written contract sued upon, and that no delivery of the notes and mortgage specified for therein were ever executed and delivered, and notwithstanding the answer alleges a breach of the warranty, and return of the property thereunder, which privilege they did not have under the contract. *Third.* Because under the terms of the written agreement, there was no warranty, unless the notes and mortgage were executed before the delivery of the property; and the answer shows that the notes and mortgage were not executed and delivered, and that under the facts stated in the answer there was no warranty, and that the terms of the written instrument cannot be varied, altered and changed by parol agreements. *Fourth.* That it is shown by the answer that there was no warranty of the machinery on the part of the plaintiffs, and that defendants cannot avoid payment of the same by offering to return the same."

It will be observed that the contract upon which the suit was brought is wholly executory. It was an agreement to take the machine and give the notes. By the averments of the answer, which are to be taken as true, the machine was shipped to the agent Gross, and by him delivered to the defendants. It is insisted by the plaintiffs that the defendants had no right to take the machine without giving the notes. It appears that Gross undertook to waive this provision of the contract, and delivered the machine for trial before giving the notes. The plaintiffs and the court seem to have been of the opinion that the defendants by their answer claimed that there was a breach of the written warranty. That seems to be the basis of the second and third grounds of demurrer, which were sustained. We do not so understand the answer. It avers that the machine was absolutely worthless, and wholly unfit to perform the work for which it was intended; and that, for that reason, they refused to accept it as being in compliance with the order. The transaction never became a complete sale. But the plaintiffs, by their petition, claim that, after the defendants wrongfully converted the machine to their own use, they refused, and still refuse,

to execute the notes; and damages are claimed in the sum of the contract price of the machine. The complaint really is that defendants did not complete the contract by giving the notes. As we have seen, the defendants do not defend the action by averring a breach of the written warranty. Now, it may not have been within the power of the agent to deliver the machine without the receipt of the notes, but the fact remains that, so far as this record shows, the machine was in fact worthless; and the plaintiffs are in the position of claiming that, notwithstanding that fact, that defendants were required to give their notes, attempt to make it work, call in the plaintiffs, give necessary and friendly assistance, and take another machine, or take their notes back. It is true that, where a written warranty is made, a different contemporaneous parol warranty cannot be shown. But in all executory sales the contract always carries with it an obligation that the article sold shall be merchantable, or, in other words, reasonably suited to the purposes for which it was intended. *McClung v. Kelley*, 21 Iowa, 508. And this warranty is implied. The defendants, by their answer, evidently intended to rely on this implied warranty as authorizing them to refuse to receive the machine under the contract. We know of no rule of law which, under the facts set out in the answer, would require the defendants to give their notes for a worthless machine, and go through all the circuitous and perplexing delays and loss required by the order, in order to protect themselves against the payment of the notes upon the ground of the written warranty. The answer makes it perfectly plain that they never received the machine as in compliance with the contract; and, as it appears from the answer that it was worthless, they could not be required to receive it as a fulfillment of the contract. They took it upon trial, and returned it, and refused to take it on the contract. We think that the demurrer should have been overruled.

II. The plaintiffs appeal from the order overruling the demurrer on the first and fourth grounds thereof.

These grounds of demurrer do not differ essentially from those which were sustained. When it is determined that the answer presents a good defense, that disposes of all there is in the case. Indeed, it appears to us that all of the grounds of the demurrer are founded upon the one idea, which is that the defendants, by their answer, rely on the written warranty, and a breach thereot. We think this is a mistaken view of the averments of the answer, and that the demurrer should have been overruled generally.

REVERSED.

75	50
83	587
75	50
89	284
75	50
94	240
75	50
100	293
75	50
102	365
75	50
133	244

THORP V. BRADLEY.

1. **Statute of Frauds**: LEASES: EFFECT OF PART PERFORMANCE. The fourth subdivision of section 3664 of the Code provides that no evidence of any contract for the creation or transfer of any interest in real estate, except leases for a term not exceeding one year, is competent, unless it be in writing, etc. Section 3665 provides that the rule of said fourth subdivision shall not apply "when the purchase money, or any portion thereof, has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract." *Held* that this last provision relates solely to contracts for the purchase or sale of real estate, and does not have the effect to qualify the rule enacted by the preceding provision as to leases for a term exceeding one year. (*Hunt v. Coe*, 15 Iowa, 197, *followed*).

2. **Damages**: BREACH OF AGREEMENT TO LOAN MONEY TO REDEEM MORTGAGED LAND. In an action for the breach of an agreement to loan to the owner of land the money necessary to redeem it from a mortgage, whereby the land was lost to the owner, neither the value of the land, nor the profit which the owner might have reaped from its purchase, affords the legal measure of recovery; and, in the absence of any other averments of damage, the plaintiff's recovery must be but nominal.

3. **Appeal**: PRACTICE: REVERSAL FOR NOMINAL DAMAGES. This court will not reverse a cause for the mere error of the trial court in refusing to award nominal damages to the appellant.

Thorp v. Bradley.

4. **Statute of Frauds**: AGREEMENT TO BUY IN MORTGAGED LAND AND CONVEY TO MORTGAGOR. An oral agreement made with the owner of mortgaged land to procure the title under a foreclosure of the mortgage, and to reconvey to the mortgagor upon being reimbursed by him, is not a mere agreement for the loan of a sum of money, but an agreement for the creation and transfer of an interest in real estate, and is within the statute of frauds. (Compare *Hain v. Robinson*, 72 Iowa, 735).

5. **Change of Venue**: DISCRETION OF COURT. A motion for a change of the place of trial of a civil action, on the ground of undue influence by the other party and his attorneys over the inhabitants of the county, is addressed to the discretion of the trial court, with which this court will not interfere in the absence of a showing of abuse of discretion.

Appeal from Appanoose District Court.—HON. H. C. TRAVERSE, Judge.

FILED, SEPTEMBER 6, 1888.

PLAINTIFF'S petition, which is at law, contains eight counts. The rulings complained of on this appeal, however, relate to questions arising on the first and eighth counts. In the first count plaintiff claims to recover for rent of real estate under a parol lease for a term of years. In the eighth count he claims damages for the breach by defendant of an alleged parol contract, whereby he agreed to buy in at a sale under a judgment of foreclosure certain real estate belonging to plaintiff, and hold the same as security for the money to be advanced in making the purchase. Defendant, among other defenses, pleaded the statute of frauds. On the trial the district court excluded the evidence offered by plaintiff in support of these claims, and directed a verdict for defendant thereon. Plaintiff appeals.

E. Morrison and *George D. Porter*, for appellant.

Tannehill, Vermilion & Haynes and *T. M. Fee*, for appellee.

REED, J.—I. The evidence offered in support of the first count, and which the court excluded, would have

1. STATUTE of frauds: leases: effect of part performance.

tended to prove that defendant took possession of the leased premises under the parol lease, and occupied the same during the term, and that he had paid a portion of the stipulated rent. Our statute of frauds (secs. 3663, 3664) provides that no evidence of any contract for the creation or transfer of any interest in real estate, except leases for a term not exceeding one year, is competent, unless it be in writing, signed by the party sought to be charged, or by his lawfully authorized agent. Section 3665 provides that the above provision shall not apply "when the purchase money, or any portion thereof, has been received by the vendor; or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract." Plaintiff's contention is that the excluded evidence is competent under this exception, and would have taken the case out of the prohibition of the preceding provisions. In *Hunt v. Coe*, 15 Iowa, 197, this court had occasion to determine the effect of the provision quoted from section 3665, and it was then held that it related solely to contracts for the purchase or sale of real estate, and that it did not have the effect to qualify the rule enacted by the preceding provisions as to leases for a term exceeding one year. The statute has now existed for twenty-five years with this construction upon it, and we would not now be justified in departing from that construction, even if its correctness were doubtful. It is proper to say that the allegations in the petition as to the contract were denied in the answer; also that the evidence offered to establish it did not consist of the testimony of the defendant; so that no questions under sections 3666 and 3667 arise in the case.

II. The allegations in the eighth count are that plaintiff was the owner of a farm which was incumbered by a mortgage about to fall due, and that the parties entered into a parol contract, whereby defendant agreed to purchase the farm under the foreclosure sale, or to buy in the certificate of purchase under such

2. DAMAGES: breach of agreement to loan money to redeem mortgaged land.

sale, and acquire title to the property thereunder, and hold the same as security for the money so advanced until plaintiff should be able to repay the same, and upon such payment to reconvey the premises to him; and that plaintiff, relying on this promise, had neglected to renew the mortgage debt, which he could, and but for the promise would, have done; but that defendant had neglected and refused to either bid in the premises at the sale, or acquire the certificate of purchase, and by reason of such neglect and refusal the title and ownership of the farm had been acquired by another, under the mortgage, whereby plaintiff had been damaged in a large amount. The excluded evidence would have tended to prove these averments. If it should be conceded that this contract was in effect merely an agreement for the loan of an amount of money sufficient for the payment of the mortgage debt, which is the interpretation contended for by counsel for appellant, it would follow that the special damages alleged are not the proximate consequence of the alleged breach, but are remote and speculative. The condition of the parties under it would be the same as if they had contracted for the loan of a sum of money to enable plaintiff to purchase a particular estate, but which, owing to the breach, he was not able to acquire. In an action on such an agreement, neither the value of the estate nor the profit which might have accrued from its purchase would afford any legal measure of recovery; and, in the absence of any other averments of damages, the plaintiff's recovery would be but nominal. On the allegations of the petition, then, plaintiff could in no event recover more than nominal damages; and the refusal of the trial court to award such damages, whatever the ground of such refusal may have been, does not afford ground for reversal.

2. APPEAL: practice: reversal for nominal damages.

But we are of the opinion that the contract cannot be regarded as a mere agreement for the loan of a sum of money. By its terms, as alleged, defendant

4. STATUTE of frauds: agreement to buy in mortgaged land and convey to mortgagor.

was to acquire the title to the premises, and hold them as security for the money advanced, and reconvey them to plaintiff upon the repayment of that sum. It is clearly an agreement for the creation and transfer of an interest in real estate. The only breach which, by any possibility, could result in damage to plaintiff, is the failure to reconvey the premises to him. True, it is alleged that defendant had refused to acquire the title in the manner stipulated; but that averment is important only as showing the inability of defendant to perform his agreement to convey. The contract alleged, then, is for the conveyance of the premises, and it clearly is within the inhibition of the statute. In principle, there is no distinction between this agreement and the one considered in *Hain v. Robinson*, 72 Iowa, 735.

III. Error was assigned on the overruling of a motion by plaintiff for a change of place of trial, on the ground of undue influence by defendant and his attorneys over the inhabitants of the county. The application was addressed to the discretion of the court, and we deem it sufficient to say that it does not appear from the record that there was any abuse of the discretion with which the court is clothed. AFFIRMED.

5. CHANGE of venue: discretion of court.

MALCOMSEN *et al.* v. GRAHAM *et al.*

1. **Appeal:** PRACTICE: NOTICE: SERVICE ON CLERK: PROOF: NOTICE LOST: CORRECTION OF RECORD: WAIVER. A failure to have the transcript show a service of the notice of appeal upon the clerk of the trial court is not of itself sufficient to defeat the appeal, where the appellant shows by affidavit that the notice was in fact served on the clerk, but that the notice itself, with the proof of such service, has been lost from the records below. In that case he may have a continuance for the purpose of perfecting the record in the trial court. (*Gardner v. Burlington, C. R. & N. Ry. Co.*, 68 Iowa, 589). Where, however, the abstract recites that the notice was duly served on the clerk, and the appellee does not ask to have the lost notice restored, and does not object to the competency of the evidence offered in this court to show the fact of service, the cause may be submitted on its merits.

2. Will: VALIDITY: UNDUE INFLUENCE: EVIDENCE. The decedent in this case, in disposing of his property by will, gave nearly all of it to a friend and his sons, giving to only one of his relatives any considerable portion, and to others of them only nominal sums. The will was made at the house of the friend, where the decedent had been taken at his own request, and where he died three days afterwards. The relatives sought to set aside the probate of the will on account of the alleged weakness of the decedent's mind at the time it was executed, and the undue influence of the friend upon him; but, upon consideration of the evidence (see opinion), *held* that the allegations of the petition were not sustained.

Appeal from Jasper District Court.—HON. D. RYAN, Judge.

FILED, SEPTEMBER 6, 1888.

THIS is an action in equity to set aside the probate of a will, and to enjoin the sale of property by the executor. The district court dismissed the petition, and rendered judgment in favor of defendants for costs. Plaintiffs appeal.

Winslow & Varnum, for appellants.

Clements & Ward, for appellees.

ROBINSON, J.—I. Appellees have filed a motion to dismiss the appeal on the alleged ground that no notice of appeal was ever served on the clerk of the district court. This motion is based upon the fact that no notice of appeal showing such service is now on file in the clerk's office. It is contended by appellants that such notice was in fact served upon the clerk, and duly filed by him, but is now lost. This claim is supported by affidavits which, if competent, show the facts to be as alleged by appellants. The question presented for our determination is whether or not an appeal has been taken and so far perfected as to permit us to retain the case for decision on its merits. "An appeal is taken by the service of a notice in writing on

1. APPEAL: practice: notice: service on clerk: proof: notice lost: correction of record: waiver.

the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining the part." Code, sec. 3178. The statute recognizes a distinction between taking and perfecting an appeal. *Fairburn v. Goldsmith*, 56 Iowa, 347. Section 3214 of the Code provides that "the original notice of appeal must be returned immediately after service to the office of the clerk of the district court where the suit is pending." But the taking of the appeal is not made to depend upon the return of the notice to the office of the clerk. That such a return is important to preserve the notice and the return of service, to inform the clerk and all persons who are or may become interested in the case of its condition, and to enable the clerk to make a transcript which shall show that an appeal has been taken, will not be denied. It was evidently the purpose of the statute to require the records of the trial court to show when an appeal is taken; and section 98 of the rules of this court requires the abstract of the record to show that a notice of appeal has been served upon the appellee and upon the clerk. *Plummer v. Peoples' Nat. Bank*, 74 Iowa, 731. Section 12 of the rules requires the clerk to append to the transcript copies of the notices of appeal, and requires controversies as to the record to be determined by reference to the transcript. The failure of the transcript to show a notice of appeal served on the clerk is, therefore, *prima-facie* evidence that none has been served, and, in the absence of any further showing, would authorize us to sustain the motion to dismiss the appeal. But appellants have made such a showing as to entitle them to a continuance for the purpose of having the lost record restored in the district court, if the case cannot otherwise be submitted on its merits; hence the motion to dismiss must be overruled. It is based upon the idea that a failure to have the transcript show a service of notice on the clerk is of itself sufficient to defeat the appeal. In our opinion this is not the case.

It is usual to have defects in the original records corrected in the court below. *Gardner v. Burlington, C. R. & N. Ry. Co.*, 68 Iowa, 589. But it is competent for the parties to waive such correction, and to proceed in this court without it. The abstract recites that notice of appeal was duly served on the defendants and the clerk. We do not understand that appellees ask to have the lost record restored, nor that they object to the competency of the evidence offered in this court to show the fact of service, if the defect in the transcript is not fatal to the appeal. The cause will therefore be considered on its merits.

II. The plaintiffs are heirs of one Jacob Scott, deceased. On the twenty-ninth day of March, 1886, Scott made the will in controversy, and on the first day of the next month he died. The will bequeathed to each of the plaintiffs but one a nominal sum of money; to defendants Mary A. Ackerson, William E. Graham and John T. Graham the sum of five hundred dollars each; and to defendant C. R. Graham the portion of the estate remaining after the payment of funeral expenses, debts and bequests. C. R. Graham was also appointed executor. Plaintiffs claim that the will was not the free and voluntary act of decedent, but that it was procured by the undue influence of C. R. Graham. It appears that the estate of decedent amounted to about thirty-five hundred dollars in value, and that Mrs. Ackerson is the only relative to whom the will gives any substantial portion of it. The alleged facts upon which appellants rely are that decedent had been on intimate terms with C. R. Graham for many years and had great confidence in his judgment; that he was taken to the house of Graham only about nine days before his death, and gave to Graham and two of his sons the greater part of his property; that he had been sick and weak in body for many months, and was the victim of a secret vice, which affected his mind; that when the will was made he was weak in mind and body, and controlled by Graham; that the provisions of the will

are grossly unfair, in that all relatives but one are practically ignored for the benefit of persons who were not related to him, and to whom he was under no obligation; that the will was contrary to decedent's intentions and ideas of right, as expressed a short time before his death, and that its execution was kept a secret until after his death. The evidence satisfies us that decedent was possessed of a clear and vigorous mind at the time he made the will in question, and that it represents his desires as to the disposition of property. But one witness testifies to the alleged secret vice, and his testimony as to that is so thoroughly rebutted as to practically destroy the value of all his testimony. The same witness testified that decedent had declared his purpose to be to leave his property to his sister, Mrs. Malcomsen, and her son; but he is not corroborated in this. The disease of which Scott died was consumption, and, while it made him weak physically, it left his mind clear and strong when the will was made. At that time he gave to the subscribing witnesses quite an extended account of his family matters, and mentioned reasons for making his will as it was executed. No one was present at the time but the lawyer who drew it and a physician. In answer to a question, Scott said that C. R. Graham had never spoken to him directly or indirectly about the disposition of his property; that the matter was never mentioned but once, when he told Graham that he proposed to remember Graham's boys for their kindness to him. It is shown that Scott desired to be taken to Graham's house for the sake of better accommodations than his sister gave him. He had long before his death expressed an intention not to leave his property to relatives; and the reasons he gave to the witnesses to the will for not leaving it to them, if not wholly sufficient, when considered from the standpoint of justice, were at least not so immaterial as to show a want of capacity to make a valid disposition of his property.

2. WILL: validity: undue influence: evidence.

The fact that he had expressed disapproval of the will of a woman who had left her property to Graham, and had said that Graham did not need the property,

and that it would have been better had it been left to those who needed it more, is relied upon by appellants. The woman had a husband, and her circumstances were different from those of Scott. His disapproval of her will is entitled to but little weight. He had previously expressed an intention not to leave his property to relatives, and had manifested a positive dislike for some of them. He seems to have been under more obligations to the Grahams than to any one else, excepting his relatives. He is not shown to have been under Graham's control, nor much under his influence.

Many authorities are cited by counsel, but in our opinion the only question to determine is one of fact; and the evidence preponderates so largely in favor of appellees that we do not regard the question as a close one. We think the appellants have wholly failed to sustain their petition.

AFFIRMED.

BURHANS v. SQUIRES *et al.*

1. **Pledge**: SATISFACTION OF DEBT: RECOVERY OF PROPERTY: PLEADING. Plaintiff, having induced defendant to take an interest in a certain joint-stock company, undertook to secure him by placing in the hands of a trustee certain paid-up life insurance policies. This action was to recover the policies, on the ground that the defendant had been reimbursed for all advancements which they were designed to secure. The petition stated that one of the purposes of the pledge was to secure defendant against loss by reason of his connection with the company, as stockholder or otherwise, by reason of his investment in the stock of the company, or his taking any other pecuniary interest in its affairs. The petition did not allege that defendant had sustained no losses under this clause of the agreement, nor did it allege facts, as distinguished from legal conclusions, showing that defendant had been reimbursed for losses of that kind. The averment that defendant had money of the company in his hands more than sufficient to reimburse him for all liabilities for which the policies were held was not sufficient, in the absence of a showing that he had a right to use the money in that way.

2. **Pleading**: SEVERAL CAUSES OF ACTION IN UNDIVIDED PETITION: DEMURRER. Where a petition not separated into divisions contains distinct causes of action, a demurrer to one of them may be sustained, and the plaintiff cannot urge the defect of his pleading to defeat the demurrer. (Compare *Wright v. Connor*, 34 Iowa, 242).

Appeal from Des Moines District Court.—HON. CHAS. H. PHELPS, Judge.

FILED, SEPTEMBER 6, 1888.

THE plaintiff asks that a trust in regard to certain life insurance policies be terminated, and the policies surrendered; that certain books of account be revised and amended; and that he have judgment for damages. A demurrer to the petition was sustained, an amendment to the petition filed, and a demurrer to the amended petition sustained. The plaintiff electing to stand on his pleading, judgment was rendered dismissing the action, and in favor of defendant for costs. The plaintiff appeals.

Newman & Blake and *D. P. Stubbs*, for appellant.

Hedge & Blythe, for appellees.

ROBINSON, J.—The petition alleges that the plaintiff, the defendant Squires, and another, organized the

1. PLEDGE: satisfaction of debt: recovery of property: pleading.

Burlington Notion Company, under the incorporation laws of Iowa, for the purpose of operating a car to be fitted up, stocked with goods, and transported upon railways, the goods to be sold from the car, and delivered at once; that to insure the success of the company, and to provide security for advancements made to the company, plaintiff placed in the hands of the defendant Peasley, as trustee, two paid-up life insurance policies, under an agreement in writing as follows: "Exhibit A. Whereas, I have induced C. P. Squires, of Burlington, Iowa, to become pecuniarily interested in the Burlington Notion Company, a corporation of that name, and to become a

stockholder in said corporation; and whereas, said corporation is organized to further an enterprise begun by me, and one in which I am peculiarly interested, and my means and credit are not sufficient to proceed further in said business without assistance; and whereas, said C. P. Squires has already advanced large sums of money, and intends to indorse the paper of said Burlington Notion Company to enable it to raise additional funds for the purpose of said corporation: Now, in consideration of the above, I, A. H. Burhans, of Burlington, Iowa, have this day assigned to Jos. C. Peasley, of Burlington, Iowa, the following paid-up policies of life insurance [describing them] in trust to secure to said C. P. Squires the payment to him of all moneys advanced by him to the Burlington Notion Company, to indemnify him for all indebtedness or liability he may incur by reason of any indorsement or indorsements he has made or may make of any paper of said Burlington Notion Company, and, in fine, to secure and indemnify the said C. P. Squires against all loss or damage he may sustain by reason of his connection with said Burlington Notion Company, whether as stockholder or otherwise, and of his investment in the stock of said corporation or taking a pecuniary interest in its prosperity, interest or affairs. [Signed] A. H. Burhans." The petition further alleges that Squires sold a car belonging to the company, worth four thousand dollars, and converted the proceeds to his own use; that he failed to keep the contract hereinbefore set out, to the damage of plaintiff in the sum of five thousand dollars; that he collected about four thousand dollars for advertisements on said car, one-half of which belonged to plaintiff; and that there were errors in the books of the company amounting to about five hundred dollars. The material part of the amendment to the petition is as follows: "(1) Defendant Squires has been fully reimbursed for all payments made and money advanced, either by way of endorsements or payments made for the Burlington Notion Company, or otherwise, as provided and set forth in said Exhibit A, and he has no just right or claim to the said insurance policies, nor has

the said Peasley, trustee, any right or authority to retain and withhold the same from plaintiff. (2) Plaintiff shows further that defendant Squires had collected debts due to said notion company, and sold its property and assets in large amounts and sums, more than sufficient to reimburse and pay him for all liabilities incurred, for which he has any claim or right to hold through said trustee said insurance policies." To the petition as amended defendants demurred "on the ground that the facts set forth therein do not entitle plaintiff to the relief demanded. Plaintiff does not show that defendant Squires has not incurred loss and liability, or that plaintiff has paid the same."

I. The chief question presented by the demurrer is the sufficiency of the showing set out in the amendment to the petition as to the termination of the trust. The contract set out in Exhibit A shows that the policies of insurance were delivered to the trustee for the following purposes: (1) To secure Squires for all money advanced by him to the company. (2) To secure him for liability which he might incur by reason of indorsements made or to be made of paper of said company. (3) To secure him against loss by reason of his connection with the company as stockholder or otherwise, by reason of his investment in the stock of the company, or his taking any other pecuniary interest in its affairs. It is insisted by appellee that the averments of the amendment do not show that there has been no loss or liability of the kind contemplated in the third class, and we are of the opinion that this is true. The demurrer admits only facts well pleaded. The first paragraph of the amendment only alleges in legal effect that Squires has been fully reimbursed for money advanced and payments made on account of the company. The concluding part of the paragraph is only the conclusion of the pleader, and does not extend the effect of the preceding averments of fact. *Freeman v. Hart*, 61 Iowa, 529; *Smith v. Henry County*, 15 Iowa, 385. The second paragraph of the amendment to the answer alleges, in effect, that Squires has money in his hands belonging to the company

more than sufficient to reimburse him for all liabilities for which the policies were held. But it is not asserted that he has any right to use such money for any purpose, and if it be conceded that the facts alleged would amount in law to a payment of such liabilities, there is no showing that he has sufficient to pay all losses contemplated by the terms of the trust; nor does it appear that he would have any authority to make such use of the money. We conclude that the petition does not show such facts as would warrant the termination of the trust and the return of the policies.

II. The petition, as amended, is not separated into divisions, but nevertheless seeks relief on account of several alleged causes of action. We are not called upon to determine the sufficiency of any of these, excepting the one already considered. The second demurrer contains but one ground, and that is limited to the showing for a termination of the trust. Appellant insists that all the causes of action set out in his petition must be considered on this appeal, while it is contended by appellee that all issues, excepting that in regard to the policies of insurance, were adjudicated finally by the ruling on the first demurrer. Whether this claim of appellee is well founded or not we need not determine. This court held, in the case of *Wright v. Connor*, 34 Iowa, 242, that where an answer not separated into divisions contained distinct defenses, a demurrer to one might lie, and that the fact that the answer was not properly separated into divisions could not be urged against it. The principle of that case is applicable to this. The matter of the trust is separate and distinct, and plaintiff should not be permitted to urge the defects in his pleading to defeat the demurrer.

2. PLEADING: several causes of action in undivided petition: demurrer.

AFFIRMED.

KNOX v. SINGMASTER *et al.*

1. **Deed:** DAUGHTER TO FATHER: UNDUE INFLUENCE: RESCISSION. Courts of equity will closely scrutinize a deed made to a parent by a child who has just become of age; and in many cases the fact that a deed has been so executed is sufficient to justify a court of equity in setting it aside. (Compare *Spargur v. Hall*, 62 Iowa, 500; *Samson v. Samson*, 67 Iowa, 258.) But where, as in this case, a daughter, who had only shortly before reached her majority, conveyed to her father, without consideration, land which he had some years before conveyed to her without consideration, and for the sole purpose of divesting himself, for the time being, of the legal title, it being about all the property he then owned; and he had not ceased to treat the land as his own, making improvements and paying taxes, and almost continuously occupying it personally; and the daughter was intelligent and fairly educated, and knew her rights and the value of the land, and she made the deed without any threats, promises or inducements, but because she thought that the land of right belonged to her father, *held* that the conveyance was a valid one, and could not be set aside at the suit of the daughter after she, through the influence of others, became dissatisfied with her act.

2. **Parent and Child:** CONVEYANCE AND RECONVEYANCE: RIGHT TO RENTS. Where a father conveys land to a minor child without consideration, but continues to occupy and use it himself, and the child, after becoming of age, reconveys it to the father, without any agreement as to the rents during the time the title was in the child, the father will be holden to the child for the reasonable rental value of the land for such time, less the amount of taxes on the land accruing during that time and paid by the father.

Appeal from Washington District Court.—HON. D. RYAN, Judge.

FILED, SEPTEMBER 6, 1888.

ACTION to set aside a conveyance of real estate, and to recover rents. The district court rendered a decree setting aside the conveyance, and adjudging that plaintiff recover of defendant Frank Singmaster the sum of $398.66 for rents. The defendants appeal.

C. J. Wilson, Dewey & Eicher and *E. S. Sampson*, for appellants.

H. & W. Scofield, for appellee.

ROBINSON, J.—During the fall of the year 1875 the defendant Frank Singmaster purchased the farm in controversy, and at once made it his home. His first wife died the next spring, and he left the farm. In the spring of 1877 he conveyed it to his three minor children, of whom plaintiff was one. No consideration was paid for this conveyance, and it seems to have been made for the purpose of placing the farm beyond the reach of creditors. In December, 1877, Singmaster married his second wife, the defendant Lizzie. In the spring of 1878 he returned to the farm, and has resided upon and farmed it continuously since; making repairs and improvements, and paying taxes at his own expense, and treating the farm in all respects as his own. After her father's second marriage, the plaintiff made her home with him nearly all the time until the spring of 1881, when she went to her grandparents, a few miles away, and remained with them until October, 1882. She then returned to her father's house, and there made her home until January, 1884, when she left it, and has not since returned. While living with her father the last time, and four days after she attained her majority, to-wit, on the seventeenth day of April, 1883, she executed the deed in controversy, conveying to her father her interest in the farm. Since January, 1884, she has made her home a large part if not all the time with her grandparents. March 12, 1885, she was married, and two weeks later she filed her petition in this case.

I. The farm in controversy consists of one hundred and forty acres, worth from four to five thousand dollars. The consideration recited in the deed from plaintiff to her father was "natural love and affection," and none other was paid. Plaintiff seeks to have this deed set aside, on the ground that it was obtained by undue and improper influences. She alleges that defendants, by means of various acts and devices, obtained her confidence, kept her from communication with friends and those compe-

1. DEED: daughter to father: undue influence: rescission.

tent to advise; and, taking advantage of her youth and inexperience in business matters, procured the deed. We have examined the evidence submitted with care, and conclude that the charges of improper acts on the part of defendants are not sustained. Plaintiff seems to have been well treated while living with her father, and to have been supplied with all things necessary for her comfort and station in life. Her step-mother was evidently faithful to her trust, and sought the best interests of her charge. The plaintiff lived with her father voluntarily, and was under nothing but a wholesome and proper restraint while at his house. Nothing was ever said to her about the conveyance of her interest to her father until two days before the deed was made. She was then asked if she would make the deed, and said that she would, and the deed was made accordingly. She knew about the value of the land at the time, and her rights were explained to her when the deed was executed. At this time she was entirely satisfied to make the deed, and on the same day explained to a friend that the land had been conveyed to herself and sisters because of the embarrassments in business of her father. She was evidently of the opinion at that time that the land rightfully belonged to her father. She is shown to have been well educated in the various branches of a common-school education, and to be intelligent. She admits that she agreed to make the deed without threat or promise or inducement of any kind. It is true she says that after she had told her father she would make the deed, he told her she might make a visit to distant friends; but this is denied by the father, and plaintiff admits that she never spoke of the matter to either defendant afterwards. She seems to have been satisfied with what she had done until after she left home the next winter. Some time after the deed was made defendants discovered that she was receiving attention from the person she afterwards married, and they objected to him as not a suitable person for her to marry. The grandparents show considerable feeling against defendants, and one or two other relatives seem to encourage the plaintiff in

prosecuting this suit. In fact, we cannot come to any other conclusion than that this action would never have been deemed advisable by plaintiff except for the interference of others. Appellee insists that the deed is *prima facie* void, because made, without consideration, by a child to a parent. It is true that deeds of this character are closely scrutinized by courts of equity, especially where, as in this case, the child is but just released in law from parental control. In many cases the fact that a deed was so executed would be sufficient to authorize a court of equity to set it aside. *Samson v. Samson*, 67 Iowa, 258; *Spargur v. Hall*, 62 Iowa, 500. But each case depends largely upon its own facts. In this, if the property conveyed by the child had been acquired from some other source than the father, or if, having been derived from him, it had constituted but a part of his property, and had been conveyed as an absolute gift, with no purpose of retaining an interest in it, we should be inclined to apply a different rule from that which must govern under the facts as we find them. The evidence satisfies us that the property conveyed by Frank Singmaster to his children included about all that he then owned; that it was not his purpose to divest himself of the ownership of the land, but to protect his beneficial interest therein by transferring the legal title to his children; that he has always retained control of the land, and treated it as his own. It is true that the purpose of the conveyance was fraudulent in law, and that he could assert no adverse claim without the consent of his grantees. But the fact that the land was always treated and considered by all the parties in interest as belonging to the father, notwithstanding the conveyance, and that no consideration passed from plaintiff therefor, may well be considered, in connection with her act of reconveyance, as explaining her reasons for it. We are satisfied that plaintiff was competent to make the deed in question; that it was her free and voluntary act, made without undue influence, and for what she considered a praiseworthy object. We think it must be held valid.

II. The district court rendered judgment in favor of plaintiff for rent for the five years preceding the commencement of this suit. It is contended by appellants that, if plaintiff's deed is sustained, no rent can be allowed; and that it ought not to be allowed in any event, for the reason that the property was derived from the father, and under section 2243 of the Code no guardian was required. We do not think that either of these claims is well founded. While it is true that plaintiff conveyed the land to her father with the belief that he was justly entitled to it, yet, in law, she had owned an undivided one-third of it, and as owner was entitled to a share of the rents and profits. Nothing was said by the parties, and nothing was expressed in the deed in regard to the rents. The right to them had accrued, and did not pass with the deed nor otherwise; hence we think the plaintiff was entitled to recover them. The fact that plaintiff had acquired title from her father did not release him from liability to account to her for the rental value of her interest. Section 2243 does not require the appointment of guardians in certain cases, but it does not affect the property rights of minors who fall within its provisions. The district court erred in allowing for rent which accrued for the time subsequent to the making of the deed by plaintiff. The appellants ask that a proper allowance be made for taxes and improvements, and deducted from the rents due to plaintiff. We do not find it necessary to make any allowance for improvements, but think one-third of the taxes paid for the three years for which we allow rent should be deducted from the rents to which plaintiff is entitled. We find that the rental value of the entire farm was two hundred and eighty dollars per year, and that the taxes for the three years in question amounted to $80.50. The amount which plaintiff is entitled to recover is $253:17, with interest thereon at six per cent. per annum from the seventeenth day of April, 1883. The decree of the court is therefore

2. PARENT and child: conveyance and reconveyance: right to rents.

MODIFIED AND AFFIRMED.

RUSSELL V. CRITCHFIELD.

1. **Payment**: IN FARMERS' NOTES: IMPLIED WARRANTY AS TO COLLECTIBILITY. In the case of executory contracts for the sale of personal property not open to the inspection of the buyer, or not in existence when the contract is made, and which is not so particularly described as to leave no room for question, there is an implied warranty that the property to be furnished shall be merchantable. (See *McClung v. Kelley*, 21 Iowa, 511). On the same principle, an agreement to pay a fixed sum in farmers' notes, without specifying the particular notes to be delivered, carried with it an implied warranty that the notes should be collectible.

2. ——: ——: DEMAND. In such case, where the time for the delivery was fixed, and defendant claimed that he had delivered all the notes required by the agreement, and did not raise the issue that no demand had been made for the notes before the commencement of an action based on his failure to deliver sufficient good notes, *held* that there was no error in rendering judgment against defendant without proof of demand.

Appeal from Ringgold District Court.—HON. R. C. HENRY, Judge.

FILED, SEPTEMBER 6, 1888.

IN January, 1885, the parties to this action entered into an agreement in writing for the sale and transfer by plaintiff to defendant of certain real and personal property. A part of the consideration for this property was to be paid by defendant in farmers' notes given for agricultural implements sold at the warehouse of Critchfield, in Mt. Ayr. Some of this paper was to become due on or about the first of January, 1886, and a portion a year later. The agreement was carried out in part; but plaintiff alleges that there was due him on account thereof the sum of $1,084, and that about one-half of this amount is due by reason of the delivery to him by defendant of worthless notes, instead of notes that were collectible. The notes alleged to be worthless are

brought into court, and tendered to defendant. Plaintiff asks judgment for the amount due, and that a vendor's lien therefor be enforced. Defendant denies all obligation, and claims full performance on his part of the agreement. The district court rendered judgment in favor of plaintiff for $409.87 and costs, and adjudged that three of the notes tendered to defendant, amounting to $215.79, exclusive of interest, should be taken by him. The defendant Critchfield appeals.

R. H. Spence and *Laughlin & Campbell*, for appellant.

R. F. Askren and *J. W. Brockett*, for appellee.

ROBINSON, J.—I. It is conceded by appellant that there is due the plaintiff the sum of $169.77, besides interest. This, with the notes adjudged to belong to defendant, with interest, would equal the amount of the judgment rendered in favor of plaintiff. It is contended by appellant that the agreement in question did not require him "to turn over to plaintiff notes which were unconditionally good and collectible." It is true that it does not in terms require notes of that character. Nothing is said as to the value of the notes. But in case of executory contracts for the sale of personal property not open to the inspection of the buyer, or not in existence when the contract is made, and which is not so particularly described as to leave no room for question, there is an implied warranty that the property to be furnished shall be merchantable. 2 Benj. Sales, secs. 988, 989; *Hoe v. Sanborn*, 21 N. Y. 562; *McClung v. Kelley*, 21 Iowa, 511. In this case the agreement did not specify the particular notes to be delivered, but provided that a fixed sum should be paid in notes. We must presume that it could not be paid except in good notes. That this is the construction placed upon the agreement by the parties is shown by the fact that, when the notes were delivered, plaintiff refused to take certain notes which he knew to be worthless, and took others of which

1. PAYMENT: in farmers' notes: implied warranty as to collectibility.

he had no knowledge only on the representation of defendant that they were good and collectible.

II. It is insisted by appellant that the three notes rejected by the judgment of the court below were in fact good, and that evidence given to show that they were worthless was hearsay and incompetent. Some hearsay evidence was given, but we think the notes were shown to be poor by competent evidence. In fact, we do not understand that the defendant made any serious attempts to rebut this evidence.

2. —: —: demand. III. Appellant claims that no demand for the notes has been shown, and that it was error to render a judgment for the payment of money for that reason. The alleged failure to demand notes before the commencement of this suit is not made an issue by the pleadings, and the time for the delivery of the notes was fixed by the agreement. A complete delivery of all notes required by the agreement was claimed by appellant, and he refused to make any further adjustment of the matter. A tender of notes to the amount of one hundred and seventy-five dollars, and judgment for costs, was served by defendant after the petition was filed, and before that; but this was made under section 2900 of the Code, and was not accepted. As judgment was rendered for more than the amount of the tender, it was never material. In our opinion the judgment of the district court, so far as it can be considered on this appeal, was not erroneous. It is therefore

AFFIRMED.

HARRAH V. JACOBS.

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Surety: ON PROMISSORY NOTE: PAYMENT OR PURCHASE: LIMITATION OF ACTION AGAINST PRINCIPAL. A joint maker of a promissory note, who is in fact only a surety, and who pays the note, cannot maintain an action for indemnity against his principal after the lapse of five years from the date of payment; and it is the same if he purchases the note, for it is thereby extinguished as a note, and his action must be on the unwritten and implied agreement of his principal for indemnity. (See cases cited in opinion).

Appeal from Jasper District Court.—HON. W. R. LEWIS, Judge.

FILED, SEPTEMBER 6, 1883.

THIS is an action upon a promissory note. There was a demurrer to the petition, which was sustained, and plaintiff appeals.

Harrah & Myers, for appellant.

Clements & Ward, for appellee.

ROTHROCK, J. It appears from the averments of the petition that the plaintiff and the defendant executed a promissory note to a corporation known as the "Jasper Co-operative Association." The note is in these words: "Newton, Iowa, September 4, 1878. For value received, on or before January 1, 1881, I promise to pay the Jasper Co-operative Association two hundred dollars, with ten per cent. interest thereon from January 1, 1878, until paid. A. D. Jacobs, A. L. Harrah."

Harrah executed the note as surety for Jacobs. On the twentieth day of November, 1880, the said corporation sold all its stock to the plaintiff. The contract of sale was as follows: "That we agree to sell our stock to A. L. Harrah, as shown on the secretary's book at the

close of 1879, and ten per cent. thereon for the year 1880; the said Harrah to take all debts to the association, and to assume and pay all liabilities of the association." The corporation was dissolved, and ceased to exist as a corporation. Plaintiff claims that by purchasing the stock he became the owner of the note in suit; that the transaction was a purchase of the note, and not a payment. The action was commenced more than five years after the alleged purchase of the note from the corporation.

The demurrer was to the effect that the plaintiff can not maintain an action on the note because it was paid and discharged, and that, having paid and discharged the note as surety, the right to recover of the defendant the money paid is barred by the statute of limitations. It is very clear that, if the plaintiff can recover at all, it must be upon the note. No action can be maintained in the usual form of an action by a surety against his principal for money paid in discharge of the note, because more than five years elapsed between the time of the payment and the commencement of the suit. It will be observed that the relation of principal and surety does not appear from the instrument itself. If the relation exists, it must be established by parol evidence. The right of action would therefore be founded u pon an unwritten contract, and under our statute would be barred in five years. *Lamb v. Withrow*, 31 Iowa, 164.

SURETY: on promissory note: payment or purchase: limitation of action against principal.

The plaintiff insists that his transaction with the corporation amounted to a purchase of the note, and not a payment. The same theory was claimed in the cases of *Lamb v. Withrow*, *supra*, and *Bones v. Aiken*, 35 Iowa, 534, and *Johnston v. Belden*, 49 Iowa, 301. It is true that in all the cited cases the obligations had been reduced to judgments. But the principle involved is the same. It is that a joint maker of a note, who is in fact surety, is not entitled to recover, by purchasing a note or a judgment rendered upon it, either upon the note or judgment. It makes no difference whether he calls the transaction a purchase or a payment. His action is one for indemnity for the money paid. It is

not an action upon a written contract, and is barred in five years. Such appears to be the rule of the cases above cited. We think the demurrer to the petition was properly sustained. AFFIRMED.

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CITY OF DAVENPORT v. RICE.

Peddling: WHAT IS NOT: CITY ORDINANCE. A peddler is one who travels about with merchandise for the purpose of selling it; but a person in the service of a resident business establishment, who goes about the city carrying samples of goods kept for sale by the establishment, and solicits orders to be filled by his employers, is not a peddler, and is not subject to punishment as a peddler under a city ordinance declaring such acts to be peddling. (Compare *Town of Spencer v. Whiting*, 68 Iowa, 678).

Appeal from Scott District Court.—HON. JOHN N. ROGERS, Judge.

FILED, SEPTEMBER 6, 1888.

THIS was a prosecution under an ordinance of the city of Davenport, for peddling and hawking goods in said city without a license. Defendant was acquitted, and the city appeals.

L. M. Fisher, for appellant.

St. John, Stevenson & Whisenand, for appellee.

ROTHROCK, J.—The cause was tried by the court without a jury, and it is submitted upon appeal to this court upon the findings of fact and conclusions of law by the district court, which are as follows:

"For several years a business association or firm, known as the 'Adams Manufacturing Company,' has kept a retail store or ware-room in the city of Davenport, and a stock of miscellaneous house-furnishing goods therein for sale, on which stock it has been taxed by the city in the annual tax levy on taxable property, and has also paid a retailer's license tax under the city ordinance

providing therefor. At the time of and before the commencement of this prosecution, the defendant Rice was in the employ of the said Adams Manufacturing Company, which employed him and a number of other persons to call on citizens of Davenport at their houses or places of business, and solicit orders for goods of the various kinds kept for sale by said company; said solicitors usually carrying with them for exhibition a sample or samples of one or more of such classes of goods, and said Rice was actually engaged in soliciting and taking orders. When an order was obtained it was filled by said company by delivery from their stock of goods above mentioned. Sometimes the identical sample carried by the solicitor for exhibition was, if desired by the customer, sold and delivered to him by the solicitor. But it is not satisfactorily proved that this had ever been done by this defendant, Rice. At the time of said Rice's arrest by a police officer of said city, preliminary to this prosecution, he was found on a street of said city, having in his possession a clock from the stock of said company, which he was taking to a resident in said city, at her residence, who had informed another employe of said company that she wished to purchase a clock; and said defendant was about to visit her, with said clock as a sample, in order to solicit her order for a clock, to be sold to her by said company. Neither the defendant nor the company, at the time of beginning this prosecution, held any license as a peddler or hawker from said city. The ordinance of said city on which the prosecution is founded, so far as material to the case, is as follows (ch. 28, sec. 9, Rev. Ord. of City of Davenport, of 1884):

"'Sec. 9. No person shall hawk or peddle within the limits of this city any goods, wares, merchandise, or other articles, save and except newspapers and farm or garden produce raised by the seller, without first having procured a license therefor.

"'(*a*) The charge for said license shall be as follows: For one day, two dollars; for one week, five dollars; for one month, ten dollars.

"'(*b*) Said license shall be procurde in the manner provided in section two hereof.

"'(*c*) Soliciting orders for future delivery of goods shall be deemed and taken to be peddling within the meaning hereof; and the burden of proof, where the fact of soliciting is shown, shall be upon the defendant, and he will be required to show that the terms or provisions of this section were not by him violated.

"'(*d*) Any person found guilty of violating any of the provisions of this section shall be fined in a sum not exceeding twenty-five dollars, and shall be imprisoned until the same is paid.'

"On the foregoing facts the court is of the opinion, as matter of law: *First.* That the facts do not show that the defendant was a 'peddler' or 'hawker,' within the meaning of the clause of the city charter authorizing the city to license, tax and regulate * * * hawkers, peddlers, etc. *Town of Spencer v. Whiting*, 68 Iowa, 678; *Com. v. Farnum*, 114 Mass. 267. *Second.* That said facts do not show any violation by said defendant of any valid provisions of said ordinance. *Third.* That the city council had no power, under the city charter, to enact by said ordinance that 'soliciting orders for future delivery of goods shall be deemed and taken to be peddling, within the meaning hereof;' such soliciting not being 'peddling,' within the proper meaning of said word as used in the charter. *Mays v. Cincinnati*, 1 Ohio St. 272. *Fourth.* Defendant is entitled to judgment of acquittal herein.

[Signed] "J. N. ROGERS,
"Judge Seventh District."

It appears from the statement of facts that the "Adams Manufacturing Company" is a resident mercantile establishment occupying a store or warehouse, with its stock therein for sale, the same as other resident merchants. It employed the defendant and others to call on citizens of Davenport and solicit orders for goods of the various kinds kept for sale by said company. These solicitors usually carried with them samples of the goods offered for sale, and, when an order was

obtained, it was filled by the company from their stock of goods at their store. A peddler is an itinerant individual, ordinarily without local habitation or place of business. The only difference between the company represented by the defendant and any other resident merchant was that, for the purpose of securing business, the company sent its salesmen or clerks to the residences of the people to solicit purchasers for its wares. This is not unusual with some of the very best retail grocers. It is true, their agents and drivers may not carry samples, but we fail to see why this should make any difference. Webster defines a peddler to be "one who peddles; a traveling trader; one who carries about small commodities on his back or in a cart or wagon, and sells them." Worcester: "A traveling merchant; one who travels about the country carrying commodities for sale." Johnson: "One who travels the country vending small commodities." Bouvier defines peddlers to be "persons who travel about the country with merchandise for the purpose of selling it." Under these definitions we suppose that if an itinerant person should deposit his goods in a car or room, and from that place as a depository he should take his wares through the city, from place to place, for sale, he would be a peddler. But the establishment represented by the defendant had its operators where its goods were exposed for sale, and where they were actually sold, and the solicitation of orders for goods by sample was in no sense peddling. The authorities cited in the findings of the court fully support the conclusion made by the learned district judge who tried the case. Indeed, we think the case of *Town of Spencer v. Whiting* is in principle conclusive upon the question.

AFFIRMED.

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MICKLE & CO. v. DOUGLAS *et al.*

1. **Mining Lease**: CONSTRUCTION: IMPLIED RESERVATION OF SURFACE-OWNER'S RIGHTS. A mining lease made by defendants granted to plaintiffs the right to mine "all the coal" under certain described premises. Over the premises so leased a railroad had been constructed, and was being operated at the time the lease was executed, and the company afterwards enjoined plaintiffs from mining the coal under its right of way, and plaintiffs now seek to recover of defendants the damages sustained by reason of the injunction. But *held* that no recovery could be had, because the mining estate was servient to the surface estate, and the lessees took the lease with an implied covenant that they would so conduct their mining operations as not to damage the surface or dominant estate by undermining it.

2. ———: ———: RIGHT TO REMOVE BUILDINGS AFTER FORFEITURE. A mining lease made by defendants to plaintiffs provided that if the lessees failed to pay the stipulated royalty within thirty days after the same became due, and perform the other conditions of the lease, the same, and all rights thereunder, should be forfeited, and the lessors might take possession of the mine and all property connected therewith. It also provided that upon the termination of the lease the lessees might remove all new buildings placed on the premises by them, unless all right thereto had been forfeited by a forfeiture of the lease. *Held* that the right to remove the buildings within a reasonable time after the lease was terminated by a forfeiture for the non-payment of the royalty was not lost by the forfeiture of the lease; because forfeitures are not favored by the law, and will not be construed to embrace property not clearly within the meaning of the language providing for the forfeiture.

Appeal from Monroe District Court. — HON. E. L. BURTON, Judge.

FILED, SEPTEMBER 6, 1888.

ACTION upon a lease granting the right to mine coal. Plaintiffs seek to recover damages for the breach of an implied covenant for quiet enjoyment, and also to recover the value of certain buildings erected on the premises, which the defendants converted to their own use. Trial to the court, and judgment for defendants. Plaintiffs appeal.

Lafferty & Morgan, *McNett & Tisdale* and *Anderson & Anderson*, for appellants.

Henry L. Dashiell, H. W. Gleason and *T. B. Perry*, for appellees.

SEEVERS, C. J.—I. A sufficient statement of the material facts applicable to the first point determined, we think, is the following: The defendants, or those under whom they claim, owned certain real estate, which was underlaid with coal. Works had been erected, a shaft constructed, and coal mined, when the defendants leased said works and all property on the premises used for mining coal to the plaintiffs, together with the right to mine coal, for which the latter agreed to pay royalty for all coal mined. The plaintiffs, under the lease, had no right to the surface, except so far as was necessary for the due prosecution of the mining right. Over the premises so leased a railroad had been constructed, and was being operated at the time the lease was executed. The plaintiffs, upon making the attempt to mine the coal under the railway company's right of way, were enjoined from so doing at the instance of such company. For the purposes of this case it must be conceded that such injunction was rightfully issued, and bound all parties to this action. But the plaintiffs claim that under the lease they had the right and were bound to mine all the coal underlying the leased premises, including that under the right of way; and, as appellants have been deprived of such right, they have been greatly damaged. The lease provides and grants to the plaintiffs the right to mine "all the coal" under certain described premises. The contention of the appellees is that such right was subject to an implied covenant on the part of the "lessees that they, in mining the coal from under the right of way, shall do so with due regard to the rights of the owner of the surface, and leave all needed subjacent supports." The railway company, for all practical purposes, owned the surface, and the defendants the coal thereunder. The right to mine this coal was granted to the plaintiffs, and the question is, what is the extent of such right, or what does it include? In

1. MINING lease: construction: implied reservation of surface-owner's rights.

the absence of a contract to the contrary, the right to mine coal underlying the surface of land is subject to an implied covenant that only so much of the coal can be removed as can be obtained without injury to the superincumbent soil or surface. In other words, as there are two estates, the right to mine is regarded as the servient estate, and can be enjoyed to such extent as will not cause injury to the dominant estate or surface. It is therefore incumbent on the owner of the mining right to leave coal sufficient, or otherwise support the surface. The authorities cited by counsel for appellees support this view, and none have been cited by counsel for appellants that conflict therewith. The authorities cited are: Wood, Landl. & T. sec. 575; *Jones v. Wagner*, 66 Pa. St. 429; *Horner v. Watson*, 79 Pa. St. 242; *Coleman v. Chadwick*, 80 Pa. St. 81; *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538. Such being the rule in the absence of a contract, a construction of the provisions of the lease is required. All the coal under the land was granted to the plaintiffs; that is, under the lease the right to mine and remove it was granted to the plaintiffs, subject, however, to an implied covenant that sufficient support must be left so as not to materially injure the surface or dominant estate. There is not, we think, anything in the lease which will deprive the owner of the dominant estate of such covenant, nor did the lessors, in defining the right granted, use langauge which, expressly, or by implication, shows that such covenant could not or did not exist. In addition to what has been said, the lease provides that it shall continue fifteen years, unless "all the coal in said land is sooner mined out and exhausted. But it is expressly agreed that said lease shall terminate whenever all coal under said land is mined out and exhausted." The proper construction of these provisions is that the lease shall continue for the stated time, unless all the coal is mined which can be taken out without injury to the dominant estate. There is no language used which forbids this construction, and, under the authorities above cited, we think language

used upon which the claim of appellants is based should be clear, certain, and free from serious doubt. It was adjudged in the case in which the injunction was issued that the coal could not be removed without injury to the surface or dominant estate, and, for the reasons stated, the plaintiffs cannot recover on the first count in the petition.

II. It is provided in the lease that if plaintiffs failed to pay the stipulated royalty within thirty days after the same became due, and to faithfully perform the conditions of the lease, the same, and all the rights thereunder, should be forfeited, and the defendants might so declare, and in a lawful manner take possession of the mine and all property connected therewith. In April, 1884, the defendants elected to declare the lease forfeited upon the ground that plaintiffs had "failed to comply with the terms, conditions and stipulations of said lease, and in particular in not paying the royalty or rent." In response to a notice of the declaration of such forfeiture, the plaintiffs, a few days thereafter, notified the defendants that, without conceding the legality of the forfeiture, "we hereby consent to a surrender, and hereby give you possession of the leased premises and property. * * * But we do not intend hereby to waive our right to remove from the premises within a reasonable time our property now situated thereon, nor any other rights growing out of said lease, except as hereinbefore surrendered." Thereupon the defendants took possession of the leased property. The lease contains this provision: "But it is expressly agreed that any new engines, boilers, pumps, or other machinery, buildings, houses, and other property placed in or upon said mine and real estate, which is not in the nature of repairs thereon, may be removed by plaintiffs, at the termination of this lease, unless all right thereto has been forfeited by plaintiffs by a forfeiture of this lease." The evidence tended to show that plaintiffs erected certain houses on the leased premises, which were not in the

2. —: —: right to remove buildings after forfeiture.

nature of repairs. The plaintiffs surrendered possession of the premises to the defendants on the sixth day of May, 1884, and on the twenty-seventh day of the same month demanded possession of said houses and other property on the leased premises, including mules, car-wheels, coal-props, etc., and, failing to obtain such property, this action was brought to recover the value thereof. We believe the material controversy is as to the right of the plaintiffs to recover the value of the houses. We understand the law to be that when one person builds houses upon the land of another, with the latter's consent and agreement that they may be removed, such houses are and continue to be personal property, and the right to remove may be exercised within a reasonable time after the contract under which the erections were made has expired. *Dame v. Dame*, 38 N. H. 429; *Russell v. Richards*, 11 Me. 371; *Smith v. Benson*, 1 Hill [N. Y.] 176; *Vilas v. Mason*, 25 Wis. 310; *District Twp. of Corwin v. Moorehead*, 43 Iowa, 466. It follows, of course, if the right to remove is denied, an action may be maintained to recover the value of the buildings. We do not understand counsel for appellees to controvert the foregoing proposition. His contention is that when forfeiture was exercised and declared, the right of removal ceased to exist. The language relied on is that above quoted, and it is claimed the contract of the parties was that the houses might be removed at the termination of the lease, unless all right thereto has been forfeited by the forfeiture of the lease. Now, what is the proper construction of the provisions of the lease in relation to the removal and forfeiture? When the forfeiture was declared, the lease ceased to exist, but not necessarily so as to the right of removal. The parties, at the time of the forfeiture, would be entitled to the same rights as if the lease had expired at the time fixed and limited. In such case the right of removal could certainly be exercised. The lease provides that the property may be removed "unless it has been forfeited by the forfeiture of the lease." The forfeiture of the lease does not nec-

essarily forfeit the property placed on the premises. The words "unless it is forfeited" clearly show and must mean that the plaintiffs must have done something, or omitted to do something, required by the lease when a forfeiture of the houses and other personal property could be claimed. There must be a valid reason for such forfeiture, independent of the forfeiture of the lease for non-payment of rent or for any other reason disclosed in the record. Forfeitures are not favored. It is true, the lease provides that in a certain contingency all rights of the plaintiffs under the lease shall be forfeited, and that the defendants may take possession of "said mine and all property connected therewith." Now it appears from the record that certain mules and other personal property were on the leased premises at the time the forfeiture was declared, and had been used thereon in connection with the mining operations. Clearly, we think, such property was not forfeited, and it is not so claimed. If not, why should the houses and other buildings? The provisions of the lease referred to must be construed as meaning the possession of the mine, and all right of the plaintiffs under the lease thereto, and not to personal property placed on the premises by the plaintiffs and used for mining purposes, for as to such property the right of removal existed, unless, as we have said, there was some reason why it should be forfeited independent of the provision in relation to the forfeiture of the mine. We think it should clearly appear that the lease provides that the property in question may be forfeited before it can be so declared. That such an inference can be drawn, based on a doubtful construction of the language used, is not sufficient. The question upon which this case turns was not involved in *Dostal v. McCaddon*, 35 Iowa, 318, and counsel do not so claim, as we understand. Conceding the correctness of the foregoing views, the evidence tends to show that the plaintiffs are entitled to recover on the second count in the petition, and, as the district court held otherwise, the judgment must be REVERSED.

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HENRY V. SIOUX CITY & PACIFIC RAILWAY COMPANY.

1. **Railroads:** COUPLING CARS: INJURY TO BRAKEMAN: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. Plaintiff, one of defendant's brakemen, in obedience to his conductor's orders, mounted the front end of a train of freight cars, moving backwards at the rate of about four miles per hour, and proceeded to the rear of the train, dismounted, and made a coupling with a standing car, but in doing so he was injured on account of the speed at which the train was moving. When he first mounted the train he had reason to believe that the conductor would immediately follow him, as was the custom, and slacken the speed of the train in order that the coupling might be made with safety; but when he dismounted he might, by glancing backwards, have seen that the conductor had not mounted the train at all, and, had he noticed the train as it approached him, he might have seen that its speed had not been reduced; but he testified that he was intent upon his work, and was relying on the conductor, and hence did not notice these things. *Held* that it could not be said, as matter of law, that he was guilty of contributory negligence, but that it was a question for the jury.

2. **Evidence:** CREDIBILITY OF WITNESS: CONTRADICTORY STATEMENTS: QUESTION FOR JURY. The fact that plaintiff's testimony on a material point differed from his testimony given on a former trial went only to his credibility, and it was for the jury to say, after hearing his explanation of the contradiction, whether his last testimony was worthy of belief.

3. **Railroads:** COUPLING CARS: DANGEROUS RATE OF SPEED: EVIDENCE: QUESTION FOR JURY. In an action by a brakeman for an injury received while coupling cars, the question whether the rate of speed of the cars was dangerous is in the nature of a conclusion to be drawn from the facts proven, and such others as are in the common knowledge of all men, and it is the duty of the jury to draw that conclusion; and while the opinions of witnesses who are qualified by their experience to express an opinion on the subject are competent evidence, they are not conclusive upon the jury, and a finding by the jury not in harmony with such opinions cannot be set aside by this court as being without warrant in the evidence.

4. **Personal Injury:** MEASURE OF DAMAGES. A brakeman, nineteen years of age, and qualified only for the work of a laborer, but who was a strong and active man, was injured by defendant's negligence so that he suffered excruciating pain for a long time, and the joints of his ankle and foot were stiffened, making him a cripple for life. *Held* that this court could not disturb a verdict of eight thousand dollars as being excessive.

Appeal from Cherokee District Court.—HON. SCOTT M. LADD, Judge.

FILED, SEPTEMBER 7, 1888.

ACTION for the recovery of damages for a personal injury sustained by plaintiff while in defendant's employ as a brakeman on one of its trains. The injury is alleged to have been caused by the negligence of defendant and its employes in the management of the train. There was a verdict and judgment for plaintiff and defendant appeals.

Joy, Wright & Hudson and *John R. Hawley*, for appellant.

E. C. Herrick and *E. F. Gray*, for appellee.

REED, J.—This cause has twice been in this court before the present appeal. See 66 Iowa, 52, and 70 Iowa, 233. The accident occurred while plaintiff was making a coupling. A number of cars were moved from the main track to a side-track, by the operation known as "kicking in." Plaintiff, who was the only brakeman on the train, removed the pin which coupled the cars to the engine, and gave the signal to the engine to back, and, when the cars were run onto the side-track, he went on top of one of them, and proceeded to the rear end of the last car, where he descended to the ground, and ran to a standing car, for the purpose of coupling it to the others. He succeeded in making the coupling, but was struck by the moving cars and thrown to the ground, and the trucks passed over one of his feet, inflicting a serious and permanent injury. His claim is that he made the coupling in obedience to a direction of the conductor, who was his superior, and whose orders he was required to obey; that it was the custom in the performance of such work for the conductor, when there was but one brakeman on the train, to go upon the moving cars, and by applying the brakes reduce their speed so that the

coupling could be made with safety; and that when the conductor gave him the order to make the coupling in question he indicated by his actions that he would follow him onto the cars for that purpose, but that he neglected to do so, and that the injury was in consequence of that neglect. He also claims that when he started to make the coupling he believed that the conductor would perform that duty, and that, when he went between the cars, he did not know that it had not been performed, or that the speed of the cars had not been reduced.

I. It was insisted in the argument that the evidence shows conclusively that the plaintiff was guilty of such negligence contributing to the injury as defeats all right of recovery. Plaintiff testified that when he went upon the cars they were moving at a rate of from four to five miles per hour, and the jury found specially that they were moving at four and one-half miles. He also testified that when he reached the top of the car, and got upon his feet, the conductor was by the side of the car, with his hand on the ladder, and was apparently about to follow him, and that it had been the uniform custom during the time he had worked upon that train, which was ten days, for the conductor to go upon the cars under like circumstances, and apply the brakes. Also that he did not notice when he descended from the cars that the conductor had not gone upon them; and that from the time he reached the ground until he was struck and thrown down, his attention was given to the matter of the coupling; and that he did not notice that the speed of the cars had not been reduced. If these are the facts of the occurrence, it cannot be said, as matter of law, that plaintiff was guilty of contributory negligence; but the question whether he was so guilty is in the nature of an ultimate conclusion to be determined from the facts, and it was the province of the jury to determine it. It is true that by a glance to the rear when he was about to descend from the cars he could have seen that the conductor had not gone on top of

1. RAILROADS: coupling cars: injury to brakeman: contributory negligence: question for jury.

them, and that, if he had noticed the cars as they approached him, he might have seen that their speed had not been reduced; but if it was the duty of the conductor to go upon the cars and apply the brakes, and he had been led by his conduct to believe that he was about *to perform* that duty, he was not necessarily negligent because he proceeded to do the work assigned to him, without first ascertaining whether he had performed it. *Beems v. Chicago, R. I. & P. Ry. Co.*, 58 Iowa, 150. The facts as testified by plaintiff do not bring the case within *Nichols v. Chicago, R. I. & P. Ry. Co.*, 69 Iowa, 156. In that case the evidence of the plaintiff showed without any doubt that he knew when he went between the cars that his signal to reduce the speed had not been understood, or was being disregarded. And the court instructed the jury that, if he knew that fact, or by the exercise of reasonable diligence might have known it, he could not recover. While we approved that instruction, we held that the verdict could only have been arrived at by totally disregarding it. But there was no *claim*, as there is in this case, that plaintiff had been led to relax that diligence in the matter which otherwise would have been required of him by the conduct of the co-employe whose duty it was to slacken the speed of the cars.

II. But it was insisted that plaintiff's testimony to the effect that he did not know when he went between the cars that the speed had not been reduced ought not to be accepted as true, for the reason that, when testifying on the former trials, he admitted that he did know that fact. Portions of his testimony on the former trials were read to the jury on this trial, and it must be admitted that it shows that he stated, on the first trial at least, that he knew when he went between the cars that the speed had not been reduced. But he claimed and testified that when he gave that testimony he was still suffering from the effect of his injury, and that he did not understand, when he gave that answer, that the question referred to that particular time, but

2. Evidence: credibility of witness: contradictory statements: question for jury.

understood that it referred to the time when he alighted from the cars. In any event, however, the fact was one affecting his credibility as a witness, and was for the consideration of the jury; and we cannot say, in view of their verdict, that his present statement is false.

III. There was no direct evidence that the rate of speed at which the cars were moving was dangerous, although plaintiff and one other witness testified that the speed at which cars were ordinarily moved when a coupling to a standing car was being made was but two miles per hour. Defendant introduced evidence, however, which tended to prove that couplings could safely be made when the cars were moving at a much higher rate of speed than were those in question at the time of the injury, and that it was customary to make couplings under those circumstances. And it was contended that the finding of the jury that the conductor was guilty of negligence in failing to apply the brakes and lessen the speed is against the evidence. The manner in which couplings are made was described to the jury by the witness. The weight of the cars was also proven. Now, the question whether the rate of speed was dangerous is in the nature of a conclusion to be drawn from the facts proven, and such others as are in the common knowledge of all men, and it was the duty of the jury to draw that conclusion. The opinions of witnesses who were qualified by their experience to express an opinion on the subject was competent evidence. The jury, however, were not absolutely bound to accept such opinions, or to be governed by them in forming their conclusion. But they might consider the facts and circumstances of the case, and, if the opinions given appeared to them to be unreasonable or inconsistent with those facts, they might reject them. It cannot be said as matter of law that the opinions expressed by defendant's witnesses are correct; but the question is one of fact, and we could not disturb the verdict on this ground without usurping the province of the jury, and overturning the rule which has long prevailed here, that

3. RAILROADS: coupling cars; dangerous rate of speed: evidence: question for jury.

we will not disturb the finding of a jury on a question as to the credit which ought to be given to the testimony.

IV. The judgment is for eight thousand dollars. Defendant contended that the amount is excessive. As stated above, the injury is of a serious nature, and is permanent. Plaintiff was but nineteen years old at the time of the accident, and was a strong, active young man. The injury caused him excruciating pain for a long time. He has been compelled to submit to a surgical operation, by which a portion of the ankle-bone was removed. The joints of his ankle and foot are stiffened, and he is a cripple for life. He was a laborer, and is neither qualified nor fitted for other pursuits. His ability to labor in any vocation to which his qualifications adapt him is greatly impaired. We cannot say, in view of these facts, that the amount awarded him is excessive.

4. Personal injury: measure of damages.

The instructions given by the court are substantially the same as those given upon the first trial, and were approved on the first appeal, and they fully covered all the questions in the case. Those asked by defendant, and refused by the court, related to the same questions, and no prejudice could have resulted from the refusal to give them.

AFFIRMED.

ENSMINGER v. ENSMINGER *et al.*

Real Estate: EVIDENCE TO ASSAIL LEGAL TITLE. Evidence to establish that a deed absolute on its face was intended to be a mortgage or that the real estate described therein belongs in fact to some other person than the grantee, must be clear, satisfactory and conclusive (see cases cited in opinion), and the evidence on which defendant's title in this case is assailed is not of that character.

Appeal from Warren District Court.—HON. J. H. HENDERSON, Judge.

FILED, SEPTEMBER 7, 1888.

ACTION in equity to determine the ownership of real estate. There was a judgment for defendants, and plaintiff appeals.

H. McNeil, for appellant.

Read & Read, for appellees.

SEEVERS, C. J. —The proper title of record to the real estate in controversy is in the heirs of H. C. Ensminger, deceased. The plaintiff claims that the property in fact belongs to him, and he has introduced evidence tending to establish such fact as he claims. The settled rule is that evidence to establish that a deed absolute on its face was intended to be a mortgage, or that the real estate described therein belongs in fact to some other person than the grantee, must be clear, satisfactory and conclusive, and not made up of loose and random statements. *Corbit v. Smith*, 7 Iowa, 60; *Kibby v. Harsh*, 61 Iowa, 196; *Knight v. McCord*, 63 Iowa, 429; *Monroe v. Graves*, 23 Iowa, 597; *Nelson v. Worrall*, 20 Iowa, 469. Having this rule in view, we have each separately read the evidence, and separately reached the conclusion that the plaintiff has failed to establish the proposition upon which his right to recover depends. We do not deem it necessary to set out the evidence, or comment upon it, deeming it sufficient to say that the evidence is conflicting, and much of it introduced by the plaintiff consists of conversations and declarations made by the deceased of a random and unsatisfactory character. Appellant has filed a motion to strike an amended abstract, because it was not filed within the time required by the rules of this court. Under the showing made by the appellant this motion must be overruled, and the judgment of the district court

AFFIRMED.

NEWTON v. RITCHIE.

1. **Instructions**: NOT WARRANTED BY PLEADINGS: ERROR WITHOUT PREJUDICE. Plaintiff sought to recover upon a state of facts alleged in his petition. One of his witnesses, however, testified to another state of facts, and the court erroneously instructed the jury as if both states of fact were in issue; but the instructions were such that the verdict for defendant necessarily implied a finding against plaintiff on both states of fact. *Held* that the error was without prejudice, and no ground for reversal.

2. **Real-Estate Broker**: ACTION FOR COMMISSION: EVIDENCE. In an action by a real-estate broker for his commission for procuring a purchaser for defendant's farm, evidence that the sale of the farm was brought about by the efforts of another agent was both competent and material on defendant's behalf.

Appeal from Madison District Court.—HON. O. B. AYRES, Judge.

FILED, SEPTEMBER 7, 1888.

PLAINTIFF is a real-estate broker. He brought this action to recover a commission for services which he alleges he performed for defendant in procuring a purchaser for a farm. There was a verdict and judgment for defendant. Plaintiff appeals.

Ruby & Wilkin, for appellant.

Dabney & Guiher, for appellee.

REED, J.—I. Plaintiff's claim, as made in the petition, is that defendant employed him to procure a purchaser for his farm, and that in pursuance of such employment he solicited one Thomas Simpson to enter into a negotiation with defendant, which resulted in a sale of the farm to him. On the trial he testified to an employment, substantially as alleged. But another witness

1. INSTRUCTIONS: not warranted by pleadings: error without prejudice.

introduced by him, one Ellis, who claimed to have been present at one time when the matter was under discussion by the parties, testified in effect that plaintiff's undertaking at that time was to effect a sale or exchange of the property. There was a substantial conflict, however, in the testimony as to whether there was any agreement whatever between the parties on the subject. At the request of plaintiff's attorneys, the court gave a number of instructions to the jury prepared by them, in which they were directed that he would be entitled to recover if he had proven the employment as alleged in the petition, and that he had rendered the service contemplated by the parties when they entered into the agreement. On its own motion, however, the court instructed, in effect, that plaintiff would be entitled to recover if the evidence showed that he was employed to effect a sale or exchange of the property, and that the sale to Simpson was accomplished through his efforts. It also gave the following instruction: "4. If, on the other hand, you find that defendant did not make any arrangement with the plaintiff, and did not place the land in controversy in plaintiff's hands for such sale or exchange, then you will find for the defendant, even if you find the plaintiff had something to do with the trade. * * *"

It was insisted by counsel that the judgment ought to be reversed, because (1) plaintiff did not claim upon any contract of employment for the sale or exchange of the property, and there was no issue under which that question arose; and (2) the instructions given by the court on its own motion are in conflict with those given on plaintiff's request. It must be admitted that the instructions submitted one question which does not arise under the pleadings, and that the usual effect of such practice will be to confuse and mislead the jury. Still, if it is clear that the jury have determined the very question upon which, under the pleadings, the rights of the parties depend, we will not reverse because of such error. The court, by the instructions given on plaintiff's motion, and by those given at its own

instance, preceding that set out above, had submitted both questions to the jury, and had told them that plaintiff would be entitled to recover if the evidence established an employment, either such as was alleged in the petition, or such as Ellis had testified to, and the rendition of the services thereunder. The fourth instruction is but the statement of the converse of that. Under it the verdict could be for defendant only in case neither state of facts was proven. The verdict then necessarily implies a finding against plaintiff, both as to the contract alleged in the petition and as to that testified to by Ellis.

II. The evidence without conflict shows that defendant traded the farm to Simpson, and that the trade was made after the time when plaintiff claims he was employed to procure a purchaser. Against plaintiff's objection, defendant was permitted to introduce testimony tending to prove that the trade was brought about by the efforts of another agent. The ruling of the court admitting that testimony is assigned as error. Under the issue, the burden was on plaintiff to prove that he procured Simpson to enter into the negotiation. The evidence objected to tended to prove that he was induced to enter into it, not by plaintiff, but by the other agent. The evidence was clearly both competent and material.

2. REAL-ESTATE broker: action for commission: evidence.

AFFIRMED.

HAMIEL *et al.* v. DONNELLY *et al.*

1. **Guardian**: SALE OF WARD'S LAND: VALIDITY: NEGLECT TO FILE ADDITIONAL BOND. The sale of an infant's land by his guardian upon the order of court, without filing an additional bond as required by the order and by section 2261 of the Code, ought not to be approved by the court; but where the sale and deed have been erroneously approved, they cannot be successfully attacked in a collateral proceeding. (Compare *Bunce v. Bunce*, 59 Iowa, 533).

2. ——: ——: ——: PETITION NOT SWORN TO: DEFECTIVE NOTICE: BOND APPROVED BY CLERK. Nor can such sale be collaterally attacked, after approval by the court, on the ground that the guardian's bond was approved by the clerk in vacation, and not by the court; nor upon the ground that the petition for the sale was not verified; nor upon the ground that the notice was served upon the ward three days before the guardian's appointment was consummated; these being but irregularities not defeating the jurisdiction of the court. (Compare *Shawhan v. Loffer*, 24 Iowa, 228; *Bunce v. Bunce*, 59 Iowa, 533).

Appeal from Lyon District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, SEPTEMBER 7, 1888.

IN August, 1877, J. L. Hamiel was appointed guardian of the plaintiffs, who were his minor sons. The plaintiffs held the title to certain wild and unproductive land in Lyon county. The said guardian made an application to the circuit court of Cedar county for an order to sell said real estate. The order was granted, and the sale was made to one W. C. Long, and the sale and deed were approved by the court. Long conveyed to other parties, and the defendants hereto now hold the land in parcels, either as grantees from Long or as remote grantees under him. This action was brought to set aside the guardian's sale and deed, and to recover the land, upon the alleged ground that by reason of certain defects in the proceedings no title was conveyed by the guardian's deed. There was a decree in the court below for the defendants, and plaintiffs appeal.

W. G. W. Geiger, for appellants.

Wolf & Landt and *E. C. Roach*, for appellees.

ROTHROCK, J.—After the land was sold at guardian's sale, and the deed made and approved by the court, the plaintiffs' guardian died insolvent. It appears that the guardian originally purchased the land from one Elliot, and caused the conveyance thereof to be made to the plaintiffs, who were his minor sons, and who lived

with him to the time of his death. It further appears that the consideration received from Long for the purchase at guardian's sale was not money, but a farm of one hundred and sixty acres in Cedar county, and that the conveyance of the land in controversy to the plaintiffs was a gift to them. It will be observed that this is a collateral attack made upon the order of sale, and the sale and deed made pursuant thereto. *Bunce v. Bunce*, 59 Iowa, 533.

I. The first point made by counsel for appellants is that the sale and deed were and are absolutely void, because the guardian did not give the additional bond required by the order of the court and by section 2261 of the Code. It is sufficient to say of this objection that in *Bunce v. Bunce, supra*, this court determined that the failure to give a sale-bond was not such a defect in the proceedings as to authorize a collateral attack upon the title. It is said in that case that "in the absence of a sale-bond it would doubtless be error to approve the sale; but where the jurisdiction attached, and the sale has been approved, it cannot, we think, be successfully attacked in a collateral proceeding by alleging the want of a sale-bond." We discover no good reason for disturbing the rule above announced.

1. GUARDIAN: sale of ward's land: validity: neglect to file additional bond.

II. It is further claimed that the proceedings were void because the petition for the order to sell was not sworn to, and the notice of the application for the sale was served on the plaintiffs on the fourteenth day of August, 1887, and the guardian was not appointed until three days afterwards. No objection is made to the form of the notice, nor to the manner of service. It does not appear when the application for the appointment of the guardian was made. The circuit court, with the whole record before it, determined that due and legal service of the pending of the application had been made upon the said minors. It was therefore not a case of non-notice, but the same was probably served before it should have been. Under these circumstances, it is well

2. ——: ——: ——: petition not sworn to: defective notice: bond approved by clerk.

settled in this state that the judgment or proceeding is not void for want of jurisdiction of the person. *Shawhan v. Loffer*, 24 Iowa, 228; *Bunce v. Bunce*, *supra*, and cases there cited. In regard to the omission to verify the petition, it is scarcely necessary to say that the defect is in no sense jurisdictional, and the same may be said of the objection that the bond given by the guardian was approved by the clerk of the court in vacation, and not by the court. We think the decree of the district court is correct, and it is

AFFIRMED.

STUART V. TROTTER BROS. *et al.*

1. **Execution**: LEVY: DELIVERY BOND: REPLEVIN BY DEFENDANT: JUDGMENT FOR SHERIFF: DAMAGES ON BOND. A sheriff levied an execution in favor of plaintiff on certain property of defendants, but they gave a bond for the delivery of the property. Afterwards they brought actions against the sheriff for the title of the property, but were defeated, and the sheriff recovered judgment for the value of the property, which judgment was paid, and the money paid to plaintiff; but it was not sufficient to satisfy plaintiff's judgment. In an action by plaintiff on the delivery bond, *held* that he was entitled to recover only nominal damages.
2. **Appeal**: REVERSAL FOR NOMINAL DAMAGES. This court will not reverse and remand a cause for the mere error of refusing to give the appellant judgment for nominal damages.

Appeal from Guthrie District Court.—HON. A. W. WILKINSON, Judge.

ACTION at law; trial to the court; finding of facts, and judgment for the defendants. The plaintiff appeals.

Charles S. Fogg, for appellant.

Applegate & Brown, for appellees.

SEEVERS, C. J.—There was placed in the hands of the sheriff an execution in favor of the plaintiff, and

1. EXECUTION: levy: delivery bond: replevin by defendant: judgment for sheriff: damages on bond.

against the defendants Trotter Bros. By virtue thereof the sheriff levied upon certain personal property, and thereupon the defendants executed to him an obligation or bond by the terms of which the defendants agreed *to* deliver to him certain specified property, which had been levied upon on the twenty-fourth day of September, 1886. This they failed to do, and the plaintiff seeks to recover in this action such damages as he has sustained. The validity of this bond is not questioned by counsel. After the execution of the bond, and prior to the day of delivery, actions were commenced against the sheriff to recover possession of the property the defendants had agreed to deliver to him. The sheriff appeared in said actions, and successfully defended the same, and he became entitled to judgments for the return of the property, or the value thereof at his election. He elected to take the latter, and such judgments have been collected and the money paid to the plaintiff, but the same failed to satisfy his judgments against Trotter Bros. Such being the material facts, appellant insists that the court erred in rendering judgment for the defendants, for the reason that there has been a breach of the conditions of the bond, and therefore the plaintiff is entitled to recover; and it will be conceded that the claimed proposition is correct; that is, because there has been a technical breach, he is entitled to recover nominal damages. But that certainly is the extent of the recovery. The bond was given to the sheriff. He defended the actions brought to recover the property, and elected to take judgments for the value thereof. The plaintiff is bound by what the sheriff did. His recovery cannot exceed the sheriff's if he had brought this action. Suppose the sheriff had elected to take the property, instead of a money judgment, could he have recovered as damages on the bond the value of the property? Clearly not. In an action on the bond he probably would be entitled to such damages as he had sustained, but this right would be measured by the value of the property. Upon the record

2. APPEAL: reversal for nominal damages.

before us the plaintiff cannot recover more than nominal damages; and for such error, conceding it to be one, we will not reverse the judgment and grant a new trial, unless it is necessary to do so to establish a permanent right. *Watson v., Van Meter*, 43 Iowa, 76.

AFFIRMED.

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PECK & BUSS v. BONEBRIGHT.

1. **Replevin**: OF PROPERTY SOLD BUT NOT PAID FOR: VERDICT AND JUDGMENT. Plaintiffs sold to defendant, on trial as they alleged, certain property, taking his notes for three hundred dollars, the purchase price, but no part thereof was paid. In an action to replevy the property, there was a general verdict for defendant. *Held* that it was properly set aside, because it did not determine the value of defendant's interest in the property, and no just judgment could be rendered thereon.

2. ——— : OF PROPERTY SOLD ON TRIAL AND NOT PAID FOR: DEMAND. One who sells property on trial, taking promissory notes for the purchase price, with the understanding that there is to be no completed sale until payment is made, may, upon a failure to pay the notes, maintain replevin for the property without a previous demand.

Appeal from Hamilton District Court.—HON. JOHN L. STEVENS, Judge.

FILED, SEPTEMBER 7, 1888.

THIS is an action of replevin to recover a well-auger and a horse-power. The plaintiffs claimed to be the absolute owners of the property. The defendant, by his answer, claimed to be the owner by purchase from the plaintiffs. There was a trial by jury, which resulted in a verdict for the defendant. A motion for a new trial was sustained. From the order granting a new trial the defendant appeals.

Chase & Chase, for appellant.

Martin & Wambach, for appellees.

ROTHROCK, J.—It appears from the evidence in the case that the plaintiffs are manufacturers of well-augers, at Storm Lake. On the twenty-seventh of August, 1884, they agreed to sell the defendant an auger for three hundred and eighty dollars. He was to pay fifty dollars in cash, and to give his promissory notes for the balance of the purchase money. The fifty-dollar cash payment was not paid, but a note was taken therefor, due in ten days. The auger was shipped to defendant at Webster City. He never at any time paid any of the purchase price of the property. The notes were, by agreement of the parties, deposited with one Eastman, the cashier of a bank at Webster City. An arrangement was made with one Smith by which he was to pay the notes for the defendant, but no payment was made. The plaintiffs claim that the auger was taken by the defendant on trial, and that no sale was to be concluded until the cash payment should be made. This action was commenced in about a month after the auger was shipped to the defendant. The property was seized upon the writ of replevin, and delivered to the plaintiffs, and they afterwards sold it to other parties. The jury found generally for the defendant.

One ground upon which a new trial was granted was that the court could not, on the verdict as returned, assess the value of defendant's interest in the property. We think the motion was properly sustained on this ground. If the court had entered judgment upon the verdict it must have been for the full value of the property, which was admitted to be three hundred dollars. This would have been a most unjust judgment. It would have compelled the plaintiffs to pay the defendant three hundred dollars, and then to take up the notes from the bank, and attempt to collect them of the defendant. If these notes had been collectible, there would in all probability have been no litigation growing out of the sale.

Another ground upon which the court sustained the motion was for error in giving the fourth paragraph of the charge to the jury. This part of the charge was

based upon the plaintiffs' theory that the auger was taken upon trial, and that there was to be no completed sale until the money was paid by Smith. The court directed the jury that, if the money was not paid, and defendant was in default, it was nevertheless the duty of the plaintiffs to make a demand before bringing suit. This was manifestly erroneous.

AFFIRMED.

ROBINSON, J., having been of counsel, took no part in the decision of this case.

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93 431

GRAY V. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

1. **Appeal**: PRACTICE: EVIDENCE WANTING. Where the abstract does not purport to contain all the evidence, and appellee insists that a large part of it is omitted, this court cannot consider whether the verdict was sustained by the evidence.

2. ——— : ——— : MISCONDUCT OF COUNSEL : RECORD. This court cannot pass on the effect of misconduct of counsel below, when the only reference thereto in the record is in the form of a statement contained in the motion for a new trial. (See *Rayburn v. Central Iowa Ry. Co.*, 74 Iowa, 637).

3. ——— : ——— : OBJECTION NOT RAISED BELOW. This court will not consider objections to rulings on instructions which were not raised in the trial court.

Appeal from Scott District Court.—HON. W. F. BRANNAN, Judge.

FILED, SEPTEMBER 7, 1888.

ACTION to recover four hundred and ninety-nine dollars for damages alleged to have been sustained by reason of negligence on the part of defendant. The case was tried to a jury, and verdict and judgment rendered in favor of plaintiff for four hundred and fifty dollars. The defendant appeals.

Grant & Grant and *John T. Fish*, for appellant.

Heinz & Hirschl, for appellee.

ROBINSON, J.—The petition alleges that on the second day of January, 1886, the plaintiff, while in the employ of defendant, without fault on his part, and in consequence of the negligence and carelessness of an employe of defendant, sustained the loss of the first finger of his right hand. The answer denies liability, and alleges contributory negligence on the part of plaintiff.

I. Appellant claims that there was no evidence that any one in its employ was negligent, nor that it is in any manner liable for the injury in question, but that the evidence shows that plaintiff was guilty of contributory negligence. The abstract does not purport to contain all the evidence given, and appellee insists that a large part of it is omitted. Under the well-known rules of practice, neither of these claims of appellant can be determined by us.

II. Misconduct of an attorney for appellee, in the closing argument to the jury, is alleged. The only reference to such misconduct which we discover in the record is in the form of a statement contained in the motion for a new trial. This is not evidence of misconduct, and must be disregarded. *Rayburn v. Central Iowa Ry. Co.*, 74 Iowa, 637.

III. Complaint is made that the court failed to instruct the jury properly as to the issues involved. No exception was taken to the charge, nor was the alleged error referred to in the motion for a new trial. The objection seems to be made for the first time in this court, and is too late.

AFFIRMED.

75	102
76	401
77	369
75	102
79	295
75	102
88	752
75	102
86	756
75	102
115	448
e115	447
75	102
131	229

PLANO MANUFACTURING CO. v. GRIFFITH.

1. **Chattel Mortgage:** INSUFFICIENT DESCRIPTION: PAROL EVIDENCE TO AID: ACTUAL NOTICE. A chattel mortgage which describes the property as "one six 1-2 foot cut Plano harvester and binder," without more, is insufficient to charge third parties with notice; but where the mortgagee, as in this case, seeks to recover of a constable for levying upon and converting the mortgaged property, and it is shown that the execution plaintiff had actual notice of the mortgage and of the property claimed under it, *held* that parol evidence might be introduced to identify the property, and that the mortgage itself was then admissible in evidence. (See opinion for cases followed and distinguished).

2. ——— : ——— : LEVY ON PROPERTY : DAMAGES : EVIDENCE OF LEVY. In an action by a mortgagee of chattels against a constable for levying upon and converting the property, where the court has held that the mortgage is void, and judgment is rendered for defendant, it is no ground for the affirmance of the judgment on appeal that plaintiff failed to prove the levy and sale of the property; for to have done so would have been of no avail.

Appeal from Wright District Court.—HON. D. D. MIRACLE, Judge.

FILED, SEPTEMBER 7, 1888.

THE defendant, who is a constable, levied an execution in favor of Minor & Jones and against one Shaver, upon a harvester and binder. Plaintiff brought this action to recover the value of the machine under a chattel mortgage executed by Shaver to plaintiff. There was a trial by jury, and a verdict and judgment for defendant. Plaintiff appeals.

Weber & Rogers and *R. H. Whipple*, for appellant.

Nagle & Birdsall, for appellee.

ROTHROCK, J.—I. The mortgage upon which the plaintiff relied was indefinite in its description. It

1. CHATTEL MORTGAGE: insufficient description: parol evidence to aid: actual notice.

described the mortgaged property as "one six 1-2 foot cut Plano harvester and binder." It contained no other words of description. That this description was insufficient to charge third persons with constructive notice of the mortgage there can be no question. See *Hayes v. Wilcox*, 61 Iowa, 732; *Rhutasel v. Stephens*, 68 Iowa, 627; *Ormsby v. Nolan*, 69 Iowa, 130; and many other cases in this court. In all these cases the question arose between the mortgagee and persons who acquired rights from the mortgagor as purchasers, or attaching or execution creditors, and it was held that the mortgagee could not by parol evidence add to the mortgage by showing what property was intended to be included therein. It has also been held that this rule excluding parol evidence has no application, and that such a mortgage is not void for indefiniteness, as against the mortgagor or his attaching creditor having actual notice of the mortgage and of the property claimed under it. *Clapp v. Trowbridge*, 74 Iowa, 550. The plaintiff in this case introduced parol evidence which tended to show that long before the execution was levied one of the members of the firm of Minor & Jones had actual notice that promissory notes were taken of Shaver by the plaintiff for the harvester and binder, and that he had given the plaintiff a mortgage on the same to secure the payment of the notes. Other evidence was introduced by plaintiff, which tended to identify the machine levied upon by the defendant as the same one sold by the plaintiff to Shaver. Thereupon the plaintiff offered the mortgage in evidence. The defendant objected upon the ground, in substance, that the mortgage was void for want of a sufficient description of the property. The objection was sustained. Thereupon the defendant requested the court to instruct the jury to return a verdict in his favor, which was done.

I. Under the rule announced in *Clapp v. Trowbridge*, *supra*, the exclusion of the mortgage as evidence was erroneous. The cited case is exactly in point. See, also, *Cummings v. Tovey*, 39 Iowa, 195. We are aware

that mortgages like the one under consideration have been said to be void, and it is contended by counsel for appellee that, if void, no validity can be imparted to them by the introduction of parol evidence. It will be observed that in all the cases relied upon by appellee the contest was not between the mortgagee and mortgagor, or one having actual notice of the mortgage. In the case of *Barr v. Cannon*, 69 Iowa, 20, the question as to the effect of actual notice of a defective mortgage was not really in the case, and it is apparent that what is said in reference thereto in the opinion was in the way of argument only. In *Ormsby v. Nolan*, *supra*, the question is neither determined nor discussed in the opinion.

II. It is claimed by the appellee that the judgment should be affirmed because the record does not show that the defendant ever levied upon or sold the harvester and binder. This cannot avail appellee. It would have been a work of supererogation for appellant to introduce evidence that defendant seized and sold the harvester after it was determined by the court that the plaintiff's mortgage was void, and that no right could be asserted thereunder. For the error in excluding the mortgage from the consideration of the jury, and directing a verdict for the defendant, the judgment is

2. ——: ——: levy on property: damages: evidence of levy.

REVERSED.

BLACK v. DE CAMP *et al.*

1. **Promissory Notes:** GIVEN FOR INDEMNITY: AMOUNT OF RECOVERY: PLEADING. The defendant D. and another entered into two written contracts, reciting in the aggregate a consideration of three thousand dollars, for the delivery to plaintiff of seventy-five Mexican ponies. They at the same time, with the other defendant as surety, executed the promissory notes sued on in this case, for the aggregate sum of three thousand dollars, in which it was recited that they were given as collateral security for the performance of the pony contracts. The plaintiff set up the notes and the pony contracts, and the failure to perform the latter and averred that he had actually paid three thousand dollars on the pony contracts, and that defendants orally agreed, after such failure, to pay the three thousand dollars named in the notes. The defendants answered, admitting the making of the pony contracts, and that the same had not been performed, and that the notes had not been paid, but denied every other averment of the petition. On these pleadings the court sustained a motion for judgment for the full amount of the notes. *Held* that this was error, because the notes were only given for indemnity, and plaintiff was entitled to recover upon them only the damages which he sustained by the failure to perform the pony contracts, which damage was not shown by the pleadings, since the averment that plaintiff had paid three thousand dollars for the ponies was denied.

2. ——: DEFENSE OF MATERIAL ALTERATION: JUDGMENT ON PLEADINGS. It was error to render judgment upon the pleadings in an action on a promissory note while an issue that the note had been materially altered by the insertion of the place of payment was undisposed of.

Appeal from Marshall District Court.—HON. JOHN L. STEVENS, Judge.

FILED, SEPTEMBER 7, 1888.

THIS action is based upon two written instruments signed by the defendants, and by which the plaintiff claims the defendants are liable to pay to the plaintiff in the aggregate the sum of three thousand dollars. The defendants answered the petition, and, after numerous

amendments to the pleadings, the plaintiff, being of opinion that the answers were not a defense, but rather a confession of the cause of action, moved the court for judgment upon the pleadings for the full amount claimed. The court sustained the motion, whereupon the defendants asked leave to amend their answer, which was refused, and judgment was rendered for the plaintiff for the full amount. Defendants appeal.

Scott & Clute and *Brown & Carney*, for appellants.

Haines & Lyman and *Caswell & Meeker*, for appellee.

ROTHROCK, J.—The two written instruments upon which the action is based are alike so far as their binding obligation is involved, and one of them is in these words: "Marshalltown, Ia., January 6, 1886. On or before July 15, after date, for value received, we promise to pay to John S. Black, at Marshalltown, Iowa, one thousand dollars, with interest from date until paid, at the rate of ten per cent. per annum after due, payable annually, and reasonable attorney's fees if suit is instituted on this note. It is hereby agreed and understood that this note shall become null and void upon the delivery of twenty-five head of Texas ponies, as per contract bearing even date herewith, to John S. Black, it being understood that this note is given as collateral security for the faithful discharge of said contract. John W. Blackwood. E. De Camp. M. De Camp." In the original petition it was averred that no part of the contract had been performed by the defendants, and judgment was demanded for the full amount named in the instruments. The defendants answered the petition by admitting their signatures to the instruments, and averring that the same, when signed and delivered, did not fix a place of payment, and that afterwards the words "at Marshalltown," as the place of payment, were fraudulently inserted by the plaintiff, and that said alteration was material, and avoided the notes.

1. PROMISSORY notes: given for indemnity: amount of recovery: pleading.

The answer denied all of the other averments of the petition. The plaintiff amended the petition by setting out the pony contracts, one of which is as follows: "Marshalltown, Iowa, January 6, 1886. This contract and agreement, entered into this day between John W. Blackwood and E. De Camp, of the first part, and John S. Black, of the second part, is to certify that the party of the first part, in consideration of the sum of two thousand dollars paid by said party of the second part, the receipt of which is hereby acknowledged, agrees to deliver to the party of the second part fifty head of Texas ponies, thirty head to be mares and twenty head to be geldings, to be from three to six years old, and from thirteen to fifteen hands high, and sound and smooth; colors to be black, bay, roan and gray, and said horses to be in good, healthy condition when delivered here. And said party of the first part agrees to deposit two thousand dollars in notes as collateral security. [Signed] John W. Blackwood and E. De Camp. John S. Black." The plaintiff afterwards again amended his petition at great length. It is not necessary to set out this amendment here. The substance of it was a repetition of the averments that the defendants failed to perform the contracts to deliver the ponies, and a claim that after such failure, by an unwritten contract, upon a valuable consideration, the defendants agreed to pay to the plaintiff the sums of money named in the written contracts upon which suit was brought. In this amendment it was averred that the consideration paid by plaintiff to defendants for the ponies was in fact three thousand dollars, as stated in said written instruments. In answer to this amendment the defendants in substance admitted the making of the contracts to deliver the ponies, and that the same had not been performed according to their terms, and that the notes given as collateral security had not been paid. And they denied every other averment of said amendment to the petition. Upon this state of the pleadings the plaintiff demanded judgment.

Counsel for the respective parties have argued the

case at length upon the rights of the parties under their written instruments. The plaintiff contends that, for a failure to deliver the ponies, the defendants became absolutely liable to pay the three thousand dollars, and interest and attorney's fees; or, rather, that these promissory notes, as counsel denominate them, are absolute obligations to pay the amounts named, which might have been discharged by delivering the ponies. There might be some ground for the claim made, if the defendants had, by their answer, admitted that the plaintiff had paid them three thousand dollars in money for the ponies, as averred in the amendment to the petition. But this averment was denied. However this may be, we think that all of these writings constitute part of the same contract or transaction. It will be observed that M. De Camp is one of the makers of the notes. He did not sign the contracts to deliver the ponies. He was a mere surety for his co-defendants for the faithful performance by them of the pony contracts. These notes, so called, were in the nature of indemnifying bonds to protect the plaintiff Black from loss by the failure of defendants to perform their contract. They do not recite that Black had paid the defendants three thousand dollars. They do state, however, that "they are given as collateral security for the faithful discharge of the contracts" to deliver the ponies. They thus import upon their face the extent of liability upon them, which is the lawful and proper damages for failure to deliver the ponies, based upon the value of the ponies, and not upon the sum named in the instruments.

Another reason why the motion for judgment should not have been sustained is that the plea of fraudulent, material alteration was not at any time withdrawn. It was in the record, and an issue in the case, and at no time disposed of, and we fail to discover how it could be met by a motion for judgment. We think it was an error to virtually hold that the defendants' answer was an admission of the cause of action and of the whole amount claimed. As we hold that the motion

2. —: defense of material alteration: judgment on pleadings.

for judgment should not have been sustained, it is unnecessary to determine whether the defendants should have been permitted to amend their answer after the ruling of the court upon the motion. REVERSED.

BOHALL V. NEIWALT *et al.*

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1. **Boundaries**: PROCEEDINGS TO ESTABLISH LOST CORNER: APPEAL: TRIAL DE NOVO: EVIDENCE. A proceeding to establish a lost corner is not triable *de novo* upon an appeal to this court (see cases cited in opinion), and the finding of the court below on the question of fact cannot be disturbed for want of evidence, where the evidence was conflicting.

2. ——: ——: APPORTIONMENT OF COSTS. The costs of a proceeding to establish a lost corner should, under section 4, chapter 8, Laws of 1884, be apportioned among the parties according to their respective interests, regardless of the benefits resulting from the proceeding. And in this case, where the corner in question was one common to four quarter sections of land of equal value, and plaintiff was the owner of one of them, and the defendants of the other three, *held* that not more than one-fourth of the costs should have been taxed to plaintiff.

Appeal from Grundy District Court.—HON. C. F. COUCH, Judge.

FILED, SEPTEMBER 7, 1888.

PLAINTIFF is the owner of the southwest quarter of section 10, township 88, range 16, in Grundy county. He alleges that the northwest corner of said premises has been lost, and that its exact location is now in dispute. He therefore asks to have it restored and established. A commissioner was appointed under the provisions of chapter 8, Laws Fifteenth General Assembly, who proceeded to make a survey and take testimony as provided by law. He reported that the corner in question had been lost and in dispute for ten or more years, during which time no particular line had been considered and treated as the true line for a period long enough to establish it. The original corner was not found, and the commissioner, therefore, reported in favor of establishing it

midway between the section corners north and south of it. The plaintiff excepted to the report, and moved that the corner be established at a point twenty-nine links north of the point fixed by the commissioners. The exceptions were overruled, and the report confirmed. The defendants then moved that all the costs of the proceedings be taxed to plaintiff. The court taxed one-half the costs to plaintiff, and the remainder to defendants. The plaintiff appeals.

O. B. Courtright, for appellant.

No appearance for appellees.

ROBINSON, J.—I. Counsel for appellant reviews the evidence at length, and insists that the findings of the commissioner were not supported by the evidence, and that the evidence conclusively established the fact that the original government corner was at a point twenty-nine links north of the corner fixed by the report. There was conflict in the evidence, and, if this case were triable here *de novo*, we might conclude that a preponderance of the evidence sustains the claim of appellant. But this court has repeatedly held that it cannot try anew a cause of this kind. *Mitchell v. Wilson*, 70 Iowa, 335; *Vittoe v. Richardson*, 58 Iowa, 576; *In re Harrington*, 54 Iowa, 35. There is evidence to sustain the report of the commissioner, and we cannot say that it is so clearly against the weight of the evidence as to justify us in setting aside the action of the district court in confirming it.

1. BOUNDARIES: proceedings to establish lost corner: appeal: trial de novo: evidence.

II. Appellant complains of the ruling of the district court which taxed one-half of all the costs to him. The statute provides that "the expenses and costs of the surveys and suit shall be apportioned among all the parties according to their respective interests." Laws 1874, sec. 4, ch. 8. It is shown that each defendant owns a quarter section of land, and that the corner in question is common to these tracts and to the one owned by plain-

2. —: —: apportionment of costs.

tiff. Each party to the suit is therefore shown to have the same amount of land involved. The question in controversy is the proper location of the corner in a right line, extending from north to south. If the corner is moved from a given point northward, each owner south of the new location will gain, and each owner north of it will lose, the same amount of land. Each party is therefore interested to the same extent, although not necessarily in the same way, for one gains what another loses. But there is no reason for concluding that it was the intention of the statute to have the costs taxed according to the benefits which result from the suit. The trial court has no discretion in the matter when the respective interests of the parties are ascertained. In this case it does not appear that there is any difference in the values of the tracts involved, and we therefore conclude that the interest of each party to the suit is equal to that of every other, and that one-fourth of the expenses and costs of the surveys and suits should have been taxed to him. The judgment of the district court is affirmed as to the report of the commissioner and the establishing of the corner, and modified in accordance with the views we have expressed as to costs.

MODIFIED AND AFFIRMED.

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81	699
75	112
100	309

ROCKFORD BOOT & SHOE MANUFACTURING COMPANY *et al.* v. MASTIN *et al.*

Fraudulent Conveyance: TO WIFE AND SONS. RIGHT TO PREFER CREDITORS. A husband and father conveyed substantially all of his property to his wife and two sons. The evidence shows that he was indebted to his wife for money advanced, and to one of the sons for labor performed and property sold, and that the value of the property conveyed to each of them did not exceed the amount of his indebtedness to them severally, but that he was not indebted to the other son. He was at the time largely indebted to plaintiffs and others. In an action by plaintiffs to set aside the conveyances and subject the property to the payment of their judgments, *held* that he had a right to prefer his wife and the son to whom he was indebted, and to secure them by the conveyances, and that as to them the relief asked was properly denied; but that such relief was properly granted as to the son to whom the father owed nothing.

Appeal from Grundy Circuit Court.

FILED, SEPTEMBER 7, 1888.

THE plaintiffs are judgment creditors of the defendant Robert Mastin, and brought this action to subject to the payment of their several judgments certain real estate which he conveyed to his wife and two sons. Judgment was rendered for the defendants Leonora and George W. Mastin, and against the defendant Alanson Mastin. Both parties appeal.

Rea & Hayes, *W. J. Moir* and *H. L. Huff*, for plaintiffs.

George Ward and *Boies, Husted & Boies*, for defendants.

SEEVERS, C. J.—I. Robert Mastin came to Iowa from New York, in 1871, and shortly afterwards he purchased, and there was conveyed to him, four hundred acres of

land. On March 7, 1882, he conveyed two hundred acres thereof to his wife, Leonora Mastin; one hundred acres to each of his two sons, Robert W. and Alanson T. At that time he was largely indebted to the plaintiffs and others, but whether he knew the extent of such indebtedness is a controverted question. In 1878 his son-in-law, Kelley, was engaged in the mercantile business, and being indebted to said Robert, the latter purchased the stock of goods and continued the business in his own name, but Kelley acted as his agent, and had full charge of the business. The defendants claim that Robert Mastin did not know that he was insolvent or largely indebted until after the conveyances of the real estate were made, and he so testifies; but we think he did know, or was bound to know, that Kelley as his agent was doing an unprofitable business, and was incurring debts which to a greater or less amount were being pressed for payment. The defendants claim that nearly fifty years ago Robert Mastin purchased some real estate in the state of New York, and, being indebted therefor, he obtained from his wife, forty years ago, some money which she obtained from her father, and that about ten years afterwards he obtained from her more money, which was due her as her share of her father's estate. They claim that said Robert promised at various times to pay his wife said money, with seven per cent. interest. The plaintiffs insist that there was no valid obligation or promise on the part of said Robert to repay such money, but that the same was a gift from his wife. It is true there was no written promise to pay; but that she did not regard it as a gift is clearly established, and we also think that he at least acknowledged the indebtedness, and somewhat indefinitely agreed to pay her whenever she wanted it. The money so obtained was invested in the land purchased in New York, which he sold for upwards of sixteen thousand dollars. Both Robert Mastin and his wife testify that the latter refused to sign the deed unless the money so received by her husband was paid or secured

to her, and that the amount was then computed and agreed to be seventy-eight hundred dollars, for which amount a mortgage, given for a part of the purchase money on the real estate in New York, was assigned and transferred to her. That such a mortgage was so assigned and transferred must be regarded as established, for it appears of record in the proper office in New York. Such transfer, we think, vested in Mrs. Mastin the title to such mortgage and the money due thereon. There is no evidence in the record tending to show that Robert Mastin was indebted at that time. Certainly he was not to any of the plaintiffs. Conceding the assignment to be an executed gift, the plaintiffs cannot legally make any valid objection thereto. But we think there was a valid and sufficient consideration for the assignment of the mortgage. Afterwards, and prior to the conveyance of April 7, 1882, Mrs. Mastin permitted her husband to collect the amount due upon the mortgage, and the same was used by him to pay debts, and a portion was loaned to his son-in-law, Kelley. We find from the evidence that when Mrs. Mastin let her husband have the money due on the mortgage he became her debtor to such amount, and that she on more than one occasion asked that he should give her security therefor. At a time when the evidence fails to show that he was in debt or in any way embarrassed, the matter was broached of conveying her a portion of the land. There was talk about it, and an effort made to do so, in December, 1881, but owing to an accident, or rather the inability of the person selected to draft the conveyance, the matter was not consummated. We are unable to find from the evidence that Mrs. Mastin had any knowledge that her husband was indebted to any considerable extent, and certainly not that he was insolvent. She so testifies, and there is nothing in the record which will warrant us in disbelieving her. She was a creditor of her husband, and he had the same right to secure or pay her as any other creditor. He conveyed, and she accepted, the land in payment of such indebtedness, and it is immaterial if

her husband did at the same time sell substantially all the property he had; and it is immaterial also that the same was done hastily, with an apparent design to place the title to the property beyond the reach of the plaintiffs, for the reason that Robert Mastin had the right to *prefer* one creditor to another, and his wife had the right to insist on and accept all that she was legally *entitled* to. The value of the land did not exceed the amount of the indebtedness.

II. The theory of the defendants is that Robert Mastin was indebted to his sons for work, labor, and property sold him by them; and, as to George W. Mastin, we find this is true. He, we believe, is about forty-six years old, and the evidence shows that his father agreed when he was in New York that if he would remain with him for a certain time he would give George W. one thousand dollars. The latter performed this agreement on his part. He worked several years *for his father*, and it was agreed that he should be paid therefor, and the latter became indebted to him for *property* purchased. We have read the evidence with much care, and reach the conclusion that Robert W. Mastin was indebted to his son George W. in a sum of about three thousand dollars, which is about the value of the property conveyed. The evidence tends to show, and we think it is established, that George W. either knew his father was in seriously embarrassed circumstances at the time of the conveyance, or, if not, he had sufficient knowledge thereof to put him on inquiry. But, as he was a *bona-fide* creditor, he had a right to secure himself; and in such a case the diligent creditor is entitled to priority over the tardy or less fortunate creditor, unless there was an actual intent to defraud, instead of a desire simply to secure an honest debt. *Chase v. Walters*, 28 Iowa, 460; *Aultman v. Heiney*, 59 Iowa, 654. We are not satisfied from the evidence that George W. Mastin intended in taking a conveyance of the land to defraud the creditors of his father. His object was, we think, to obtain payment for his work, labor and property.

III. While it must be conceded that, under the evidence, Alanson T. Mastin performed work and labor for his father for which the latter may have agreed to pay him, and also leased the farm for one year, and was to receive one-half of all that was raised, and that he sold his share to his father, still we are of the opinion that under all of the facts and circumstances his father in fact was not indebted to him. He is about thirty-six years old, and is a man of intemperate habits. His character for truth and veracity has been to some extent impeached. He lived with his father, and money and clothes were from time to time furnished him, and no account of the same was kept, and, without referring to other circumstances, we have the conviction that he was not a *bona-fide* creditor of Robert Mastin at the time the conveyance was made. The result is that the judgment of the circuit court on both appeals is

AFFIRMED.

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MAY *et al.* v. STURDIVANT *et al.*

1. **Vendor and Vendee**: SALE TO CO-TENANT: CONTINUED POSSESSION AS NOTICE. A portion of the tenants in common of an estate were in possession thereof, and they purchased the interest of one of the other co-tenants who was not in possession, but the deed was not recorded. There was no visible change in the possession of the estate, but some improvements were made thereon. Afterwards a judgment was recovered against the co-tenant who had conveyed, and her original interest in the land was sold thereunder and purchased by the defendant, who had no actual knowledge of the prior conveyance. *Held* that the continued possession by the purchasing co-tenants did not, under the circumstances, charge defendant with notice of such purchase, and that defendant's title was superior to theirs. (See opinion for authorities cited).

2. **Agency**: HUSBAND ACTING FOR WIFE: ADMISSIONS BY. Although a husband is accustomed to act as agent for his wife in the management of her property, admissions made by him when not acting for her are not binding upon her, and not admissible as evidence against her.

3. **Judicial Sale**: ACTION TO SET ASIDE: PLEADING. A petition to set aside an execution sale of land alleged simply that the defendant purchased the property at the sale and obtained a deed to it, and had actual and constructive notice at the time of the rights of plaintiff. *Held* that this was equivalent to saying that she had paid the amount of her bid; and that plaintiff could not be heard to claim, on appeal, that the testimony showed that she had not so paid, and was not a *bona-fide* purchaser.

Appeal from Appanoose District Court.—HON. DELL STUART, Judge.

FILED, SEPTEMBER 7, 1888.

ACTION in equity to quiet in plaintiffs the title to certain real estate. Judgment for plaintiffs, and defendants appeal.

George D. Porter, for appellants.

T. M. Fee, for appellees.

REED, J.—The father of the plaintiffs, in his lifetime, was the owner of the property in controversy. He died intestate, in 1876, leaving a widow and eleven children surviving him. After his death, the widow and plaintiffs, who are unmarried, and a brother, who was also a single man, occupied the premises as a place of residence. In 1883, plaintiff John H. May and the single brother spoken of above purchased of Elizabeth Gilbert, a married sister, her interest in the estate, and received a conveyance thereof from her and her husband. In 1884, defendant J. M. Sturdivant recovered a judgment against Elizabeth Gilbert in one of the courts of Appanoose county. An execution issued on that judgment was levied on an undivided one-eleventh of the property as the property of Mrs. Gilbert, and the same was sold in satisfaction of the judgment; defendant Elizabeth Sturdivant, who is the wife of J. M. Sturdivant, being the purchaser; and the sheriff subsequently executed to her a deed. Before said judgment was rendered, the single brother, who united with plaintiff John

H. in the purchase of Mrs. Gilbert's interest, conveyed all his interest in the estate to the plaintiffs Mary A., Hattie E. and Melissa. At the time of the sheriff's sale, however, neither that deed nor the one from Mrs. Gilbert was recorded. But plaintiffs were in actual possession of the premises, their possession having been continuous from the death of their father. In addition to the foregoing facts, it is alleged in the petition that defendants were charged with constructive notice of plaintiffs' rights by their possession of the premises. Also, that they had actual knowledge at the time of the sheriff's sale of the sale and conveyance by Mrs. Gilbert.

I. The general rule certainly is that the purchaser of real estate is chargeable with notice of the equities of one in possession. There are exceptions and limitations, however, to this as to all general rules. It is settled, in this state, that possession by a grantor, after full conveyance, is not constructive notice to subsequent purchasers of any right reserved in the land by the grantor. *Koon v. Tramel*, 71 Iowa, 132; *Sprague v. White*, 73 Iowa, 670. See, also, the authorities cited in the opinion in the first case. It has also been held that where one is in possession under some right which appears of record, his possession is not constructive notice of another or different right, but is referable to that right. *Rogers v. Hussey*, 36 Iowa, 664; *Brown v. Wade*, 42 Iowa, 647; *Bonnell v. Allerton*, 51 Iowa, 166. In *Rogers v. Hussey*, plaintiff purchased the property, receiving a bond for a deed, and paying the greater part of the purchase price. He subsequently paid the balance, and received a deed, which was duly recorded. But in the meantime a creditor of the vendor had recovered a judgment against him, on which execution issued, and the property was sold. Plaintiff was in possession at the time of the sale, but it was held that his possession did not impart constructive notice of his ownership before the execution of his deed, and as by the record he appeared to have taken the property subject to the lien of the judgment, he was divested of the title by the execution sale. And the same doc-

1. VENDOR and vendee: sale to co-tenant: continued possession as notice.

trine was applied in the other cases. That holding appears to be conclusive of the question which arises on the facts of this case. Before the purchase of Mrs. Gilbert's interest, plaintiffs were tenants in common with her in the whole estate. As such they were entitled to enter and use the whole of the property. Freem. Co-Tenancy, secs. 248, 249; *Com. v. Lakeman*, 4 Cush. 597; *Carpenter v. Webster*, 27 Cal. 544. At the time of the purchase they were in possession under that right. There was no change of possession after that, for Mrs. Gilbert had never occupied or used the premises. Some improvements were made on the premises after the purchase of Mrs. Gilbert's interest, it is true, but there is no evidence that either of the defendants knew that these improvements were made exclusively by plaintiffs. Possession was originally taken by plaintiffs under a right which was matter of record, and it cannot, under the rule as settled by the cases cited, be held to have constituted constructive notice of the new or additional right acquired by them under the dee d from Mrs. Gilbert.

II. Elizabeth Sturdivant is the owner in her own right of considerable property, and her husband has acted generally as her agent in the management, care and disposition of her property. The only evidence which tends to show actual knowledge by either of the defendants before the execution sale of the purchase by plaintiffs of Mrs. Gilbert's interest, is that which tends to establish certain admissions by the husband to the effect that he knew of the existence of the deed from her to them. On the trial, however, he testified positively that he did not have such knowledge. He also denied that he ever made the admissions attributed to him. If it should be admitted that their relations were such that his knowledge would be imparted to her—a matter of serious doubt, however, as he did not act for her in the purchase of this property—still the evidence by which that knowledge is sought to be proven is, as against her, entirely incompetent; for there is no pretense that when he made the alleged admissions he was acting for her.

2. Agency: husband acting for wife: admissions by.

III. When Mrs. Sturdivant bid in the property at the sheriff's sale she did not pay over to the sheriff the amount of her bid. She testified, however, that her husband had money belonging to her in his hands at the time sufficient to satisfy his judgment, and that she had given him credit for the amount of his bid on the amount he was owing her. It was contended in argument that she is not a purchaser for value. We deem it sufficient to say on this subject that no such question was made in the pleadings. The petition alleges simply that she purchased the property at the sheriff's sale, and had obtained a deed to it, and that she had actual and constructive notice at the time of the rights of plaintiff. These averments do not raise an issue of that character. They inform the defendant simply that plaintiffs were relying on the facts of such notice to defeat her title. Indeed, the averment that she purchased the property, and had obtained a deed, is equivalent to an averment that she had paid the amount of her bid, for upon a failure of a purchaser, at a sheriff's sale, to pay the amount of the bid, or make some arrangements with reference to it, satisfactory to the judgment creditor, it is the duty of the officer to disregard the bid, and again offer the property. We think the judgment of the district court cannot be sustained.

8. JUDICIAL sale: action to set aside: pleading.

REVERSED.

SCHNEITMAN V. NOBLE.

1. **Garnishment**: QUESTIONING VALIDITY OF JUDGMENT AGAINST PRINCIPAL DEBTOR. A garnishee in an attachment suit cannot, on the trial of an issue joined upon his answer, assail the validity of the judgment against the attachment defendant, on the ground that such defendant was not duly served with notice of the action, where there was a service in fact of the original notice, though defective, but which the court adjudged to be sufficient to give it jurisdiction. (See opinion for cases cited).

75	120
94	295
75	120
97	727
75	120
115	712
75	120
140	698

2. **Banks**: AUTHORITY OF CASHIER: PAYING DEPOSITOR WITH NOTES. The cashier of a bank has no authority by virtue of his office to pay a depositor by transferring notes to him; and in the absence of special authority in the cashier to make such transfer, the depositor will be regarded as holding the notes, or their proceeds, in trust for the bank, when garnished by its creditors.

3. **Garnishment**: ESTOPPEL OF GARNISHEE BY FORMER PLEA. The garnishee herein sought to retain the proceeds of certain notes which had belonged to the attachment defendant, on the ground that they had been turned over to him in satisfaction of a debt; but *held* that he was estopped from making this claim by the fact that, after he had received the notes, he brought action against the attachment defendant on that same debt, and alleged that it had not been paid, and thereupon recovered judgment. (Compare *Citizens' Bank v. Dows*, 68 Iowa, 460).

4. **Appeal**: COSTS OF PREPARING ADDITIONAL ABSTRACT. While it is the duty of an appellant to submit to this court a fair abstract of so much of the record as is material to the question involved in the appeal, yet the expense of preparing an additional abstract by the appellee will not be taxed to the appellant, where there is no reason to believe that he intentionally omitted from his abstract anything which he believed to be material.

Appeal from Guthrie District Court.—HON. J. H. HENDERSON, Judge.

FILED, SEPTEMBER 7, 1888.

ON the twenty-sixth day of August, 1885, this action was commenced against defendants J. S. Danford and E. B. Gundrum to recover the sum of $396.50, alleged to be due from them to plaintiff. On the same day a writ of attachment was issued in aid of the action, and served by garnishing appellant on the day following. Judgment was rendered in favor of plaintiff and against Danford, on the eighth day of October, 1885, for $296.70 and costs. Issue was joined on the answer of the garnishee, in which he denied all liability to Danford, and tried to the court. Judgment was rendered against the garnishee for two hundred and forty dollars, and from that he appeals.

Willard, Fletcher & Willard, for appellant.

C. A. & J. G. Berry and *Charles S. Fogg*, for appellee.

ROBINSON, J.—I. Appellant claims that the judgment against Danford is void for the alleged reason that he was not served with notice of the action. It appears that Danford was engaged in the banking business at Casey, in Guthrie county, from some time in June until about the eleventh day of August, 1885, and that his co-defendant was his cashier, and at the time in question was intrusted with the management of the business. The return on the original notice is as follows: "The within notice came into my hands on the twenty-sixth day of August, 1885, and on the twenty-seventh day of August, 1885, I served the same on the within-named defendant, J. S. Danford, by serving E. B. Gundrum, cashier and agent of J. S. Danford, by offering to read the within notice to him, he waiving the reading, and delivering to him a true copy thereof. All done within Guthrie county. F. C. Galbraith, sheriff of Guthrie county, Iowa."

1. GARNISHMENT: questioning validity of judgment against principal debtor.

Section 2613 of the Code is as follows: "When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency in all actions growing out of or connected with the business of that office or agency." It does not appear that Danford had a residence in Guthrie county, and it is shown that his indebtedness to plaintiff grew out of the business in which Gundrum was employed. The judgment recites that Danford had been duly served with notice of the suit. The evidence tends to show that he was not doing business in Guthrie county when the original notice was served, and that Gundrum was then engaged in other business. It is shown that Danford was duly served with notice of the garnishment proceedings, although he does not appear therein, nor did he appear in the original action. The rule to which this court has always adhered is that if a service of the original notice, which service is in part

imperfect, is shown to have been made, and it appears that the trial court has determined that it is sufficient, its sufficiency cannot be attacked in a collateral proceeding. *Shawhan v. Loffer*, 24 Iowa, 226; *Myers v. Davis*, 47 Iowa, 328; *Shea v. Quintin*, 30 Iowa, 58. In this case the attachment was regular; there was a service of the original notice, which the district court adjudged to be sufficient to give it jurisdiction of Danford, and a judgment was rendered against the real debtor, of which he does not seem to complain. Whether Gundrum was the agent or clerk of Danford, within the meaning of section 2613, on the date when the notice was served, or whether the return was defective, so that the judgment would have to be set aside upon a proper application of Danford, we need not determine. We are satisfied that appellant cannot question the validity of the judgment in this proceeding.

2. BANKS: authority of cashier: paying depositor with notes.

II. The place of business of Danford was closed by the sheriff on the eleventh day of August, 1885. On the morning of that day, and just before the time for commencing business, appellant obtained from the cashier of the bank a small sum of money and a quantity of notes which he alleges were received to apply in payment of a claim he then held against the bank, and which amounted to something less than three hundred dollars. The amount of the notes so received is not definitely shown, but is claimed by appellant to have been less than the amount which the bank owed him. It is claimed by appellee that these notes were wrongfully obtained, and that appellant is liable for the amount he has realized from them, since all have been collected. In the absence of a more general authority, the cashier would be restricted in his power to bind his principal to the doing of such acts as are usually performed by persons who occupy the position he held. In other words, in the absence of proof of special authority, Gundrum must be held to have had power to bind his employer only by acts done in the usual and ordinary course of business. Appellant was a depositor, and the notes were turned

over in payment of the deposit. We do not think that bank depositors are usually paid in that manner, and there is no showing that it was the ordinary method adopted by Danford. But appellant claims that the payment in notes was, in this instance, authorized by telegrams sent to the cashier by Danford, and by subsequent ratification. All we need to say as to these claims is that the telegrams were of doubtful authenticity, and the alleged ratification very unsatisfactory. We should not feel disposed to disturb the judgment of the district court on these grounds.

III. In January, 1886, the appellant commenced an action against Danford to recover the amount of the deposit in payment of which he is now insisting that the notes in controversy were delivered to him. A writ of attachment was issued in that action, and appellant delivered to the sheriff, who held the writ, two hundred and forty dollars, as the property of Danford. Judgment was rendered in that action in favor of appellant, on the sixteenth day of March, 1886, for $291.60 and costs. The proceedings in these actions are pleaded by plaintiff in this as an estoppel. The appellant, to avoid the effect of this plea, contends that his action against Danford was commenced on the advice of an attorney, for the purpose of perfecting his title to the notes which he received from the cashier, and not with the purpose of releasing any right which he had to the notes. But appellant alleged in his petition in that case "that on the eleventh day of August, when said Bank of Casey suspended business, this plaintiff had on deposit in said bank the sum of $291.60; that the said bank has never legally paid any part of said $291.60." The validity of the proceedings and judgment in that action are not questioned. Appellant having elected to treat his deposit as unpaid, for the purpose of obtaining judgment against Danford, should not be heard in this proceeding to question the effect of such election. *Citizens' Bank v. Dows*, 68 Iowa, 460, and cases therein cited.

8. GARNISHMENT: estoppel of garnishee by former plea.

IV. The appellee filed an additional abstract, and with it a motion to tax the cost of the printing and preparation of the additional abstract to appellant. The costs of printing will be so taxed, under the rules of this court. It is the duty of appellant in all cases to submit to this court, a fair abstract of so much of the record as is necessary to an understanding of the questions involved in the appeal, and he should not be permitted to cast the burden of preparing the record on the appellee, by filing an abstract so imperfect as to be an abstract in name only. It is desirable, however, in most cases, to have the record contained in the abstract abridged as much as a fair presentation of the material facts of the controversy involved in the appeal will permit. If the appellant in good faith attempts to prepare an abstract of this kind, he should not be punished for an accidental omission, nor for an honest mistake as to what is material. We are not satisfied that there was such an intentional omission of material matter from the abstract of appellant as would justify the imposition of any special penalty. The motion as to cost of preparing the additional abstract is therefore overruled. The judgment of the district court is AFFIRMED.

4. APPEAL: costs of preparing additional abstract.

FARRAR V. FARRAR. (*Two Cases*).

Habeas Corpus: CUSTODY OF CHILD OF DIVORCED PARENTS: COMMITMENT TO STRANGER. The parties hereto had been divorced, and the contention was as to the right to the custody of their child of tender years. The evidence (see opinion) showed that the mother was not a fit person to have the custody of the child, and the court decreed that it should be placed in the custody of her brother. *Held* that this was error, as it did not affirmatively appear either that the brother was a proper person to be entrusted with the child, nor that the father was not such a person; the rule being that a child should not be taken from its parents and committed to another without an affirmative showing of the unfitness of the parents, and the fitness of such other person.

Appeal from Mahaska District Court.—HON. J. K. JOHNSON, Judge.

FILED, SEPTEMBER 7, 1888.

John F. Lacey, for appellant.

No appearance for appellee.

SEEVERS, C. J.—I. The plaintiff and defendant were married in 1880. The first action was commenced by the plaintiff in 1883, and is for a divorce and custody of a son, then about two years old. There is some evidence tending to show that a decree was granted in said action, but it never was entered of record, and if it had been there are doubts whether it would have been valid. The plaintiff, however, believed she was divorced, and went to Montana, where she married one Rogers, who has since deceased. She returned to this state in 1886, and brought her son with her. In 1886 the second action (of *habeas corpus*) was commenced, and the plaintiff therein sought to obtain the custody of his child, on the ground that the defendant in such action was not a suitable person to have charge of it. About the time the child was brought before the court it was discovered that no decree of divorce had been entered of record as of the time it should have been, which was about three years prior to that time. The *habeas corpus* proceeding was continued until the divorce case could be heard, and the sheriff was appointed custodian of the child. In February, 1887, the parties agreed that the decree of divorce should be entered of record, but that the case should be redocketed, and the question as to the custody of the child tried as if no decree of divorce had been rendered. The child was placed in the custody of the sheriff, and the *habeas corpus* proceeding taken under advisement until the determination of the proceeding in equity. It does not certainly appear, but we infer, that the parties then introduced the evidence found in the record in the two cases taken under advisement. In March, 1887, the appellant filed an affidavit, stating

that the appellee had absconded and taken with her said child, and moved the court to strike her evidence from the files, unless she produced the child and placed it in the custody of the sheriff. In June, 1887, the court entered a decree in the divorce proceeding, adjudging and decreeing that James Odgen should have the care and custody of said child, and that each party should pay one-half of the cost or expense of maintenance.

II. We are satisfied the appellee is not a proper person to have the care and custody of her child. It clearly appears that when the child was a nursing babe she went off and left it for ten days or more. Her excuse for so doing is that thereby she would force her husband to permit her child by a former husband to live with her. Of the merits of this dispute we are not advised, but the conduct of the appellee, we think, shows she had little love or affection for the child, and punished it for the fault, possibly, of her husband. No excuse whatever is given why she did not take it with her so as to give it the nourishment provided by nature. She obtained the custody of the child from the sheriff by a false pretense, and has taken it to some place unknown, and, having done this, she fails to appear and defend this appeal, but retains the custody of the child, which she obtained wrongfully, and in contempt of the order of the court, although it clearly appears by her own evidence that she is possessed of ample means to enable her to defend. There is other evidence in the record which tends to show the plaintiff is not a proper person to have the custody of the child.

III. There is no evidence in the record tending to show that James Odgen is a proper person to have the custody of the child. He testifies that he keeps a feed-stable, and that he is the brother of the appellee. The record does not disclose what, if any, efforts he has made to obtain custody of the child. From his relationship to the appellee, in the absence of any showing whatever, the inference may be indulged that he has made no such efforts, and will not do so. The result is that the order of the court will not prove effective, and

the child will remain in the custody of the appellee, who, we infer, the district court found, as we find, was an unsuitable person, and that the best interests of the child require it should be placed in the care of some one else. We cannot concur with the district court in placing the child in the custody of Odgen, for the reason that there is no evidence showing him to be a fit and proper person. Certainly, before the parents, or either of them, can be deprived of the custody of their minor children, it should quite satisfactorily appear that they are not, because of unfitness, entitled to such custody, and that the person to whom they may be awarded is a fit and proper person. This should not be left in doubt, but should affirmatively appear from the evidence introduced.

IV. The next question is whether the best interests of the child, under the peculiar circumstances, require that it should be committed to the custody of the appellant, its father. We are able, we think, to confidently say that it does not appear that he is an unsuitable person. He seems to have sufficient means, and has a home. He is about forty-six years old and unmarried. His mother lives with him, but she is upward of eighty years old. There is no evidence tending to show that appellant does not intend to maintain his home, and there is no evidence in the record tending to show that he does not love his child. But we think the contrary inference may be justly indulged. We are forced to the conclusion that the best interests of the child require that it should, for the present, be committed to the care and custody of the appellant. The judgment of the district court is reversed, and the cases remanded, with directions to enter a decree in the first above-entitled case in accordance with this opinion, or the appellant may have a decree in this court if he so elects.

REVERSED.

75 129
f138 637

THE FARMERS' BANK OF JESSUP V. ARTHUR.

1. **Appeal:** ERROR WITHOUT PREJUDICE. Errors committed in favor of an intervenor, to whom no relief of any kind is finally granted, are without prejudice, and no ground of complaint on appeal.

2. **Promissory Notes:** OWNERSHIP: RIGHT OF ACTION. The *note* in suit was made to "the order of M., cashier, at First National Bank of Jessup, Iowa," and by him indorsed to plaintiff "for account of First National Bank, Jessup, Iowa." Plaintiff had possession of the note, and alleged that it owned it; and the answer by implication admitted such ownership, but denied generally all averments not admitted. *Held* that the proof of ownership was sufficient.

3. ——: LOSS OF COLLATERALS: DISCHARGE OF CO-MAKER. One of two makers of a note executed a chattel mortgage as collateral security. The mortgage appeared to have been made at the request and for the benefit of the other co-maker, and at his request it was withheld from the records, and the property was left in the hands of the mortgagor, who afterwards died. His administrator was unable to find some of the property, but such as he could find he sold, and applied the proceeds on the note. In an action against the surviving co-maker, *held* that plaintiff was not required to account for the property which could not be found; no duty being imposed upon it to preserve it.

Appeal from Buchanan District Court.—HON. J. J. NEY, Judge.

FILED, SEPTEMBER 7, 1888.

PLAINTIFF seeks to recover the amount due on a promissory note made by defendant and one Lancelot Platt, now deceased. The making of the note is admitted, but defendant avers that he signed the same as surety only, and pleads several defenses based on the alleged suretyship. He also claims payment of the note, that he has been released from liability, and other defenses. The case was tried to a jury, which found specially that, as between defendant and Platt, the defendant signed the note as co-maker. A general

verdict was returned in favor of plaintiff for the amount due on the note, and judgment rendered therefor. From this judgment the defendant appeals.

Martin & Wambach and *E. E. Hasner*, for appellant.

Woodward & Cook, for appellee.

ROBINSON, J.—I. The administrator of the estate of Platt filed a petition of intervention, in which he alleged that the note in suit was signed by defendant as joint maker; that, notwithstanding that fact, defendant had filed against the estate of decedent a claim for the amount due on the note, which he asked to have allowed in case plaintiff succeeds in this action, on the alleged ground that he signed the note as surety only. The intervenor asks to be made a party plaintiff with the bank; that defendant be held to have signed the note as joint maker, and not as surety; and that he have judgment for costs. A motion to strike the petition of intervention from the files, made by defendant, was overruled, and defendant thereupon filed an answer to it. The action of the court in overruling the motion to strike, and in sustaining certain objections made by intervenor to evidence, is objected to by appellant. If the action complained of was in fact erroneous, and if appellant is now in position to urge his objection, we should have to hold the error to be without prejudice, for the reason that no judgment was rendered in favor of intervenor, nor was he given relief of any kind.

1. APPEAL: error without prejudice.

II. Appellant insists that plaintiff has not shown title to the note in suit. It was made payable "to the order of Geo. S. Murphy, cashier, at First National Bank of Jessup, Iowa," and indorsed to plaintiff in words following: "Pay Farmers' Bank, Jessup, Iowa, or order, for account of First National Bank, Jessup, Iowa. Geo. S. Murphy, cashier." It is shown that the First National Bank ceased to exist April 20, 1886. The note is in the

2. PROMISSORY notes: ownership: right of action.

possession of plaintiff, and it is presumed to own it, in the absence of proof to the contrary. The indorsement does not show that the First National Bank is the owner. The petition alleges that it is owned by plaintiff, and numerous admissions in the answer show that this was not controverted by defendant, although the answer contains a general denial of matters not admitted. We think the proof of ownership is sufficient.

III. A chattel mortgage was given by decedent to secure the note in suit. A part of the mortgaged property was sold at private sale, and the proceeds applied in payment of the note. The defendant complains of the refusal of the district court to give an instruction which contained the following: "Plaintiff must further show what disposition has been made of the property described in said mortgage, not shown by plaintiff to have been sold. If any portion of said property is claimed by plaintiff to have been lost, or to have died, the plaintiff must show by a preponderance of the evidence that such loss or death was without fault or neglect on the part of the plaintiff." The evidence tends to show that the mortgage was given at the request and for the benefit of defendant; that it was kept from the records at his request; that it was given in November, 1885; and that the property therein described remained in the possession of the mortgagor, Platt, until his death, five months later; that some of the property could not then be found, but that the administrator of decedent took possession of all he could find, and sold the same for its value, and applied the proceeds on the note. Under these facts it was not necessary for plaintiff to account for property which could not be found when the administrator attempted to take possession of it. If any of it had been sold by decedent, or taken to pay his debts, plaintiff would not have been responsible, in the absence of consent. Nor was it the duty of plaintiff to show what had become of the property which it had not reduced to possession. It was the understanding of all parties that

3. —: loss of collaterals: discharge of co-maker.

the property should remain in the possession of the mortgagor, and no duty was imposed upon plaintiff to preserve it. In our opinion the instruction was properly refused.

IV. Other questions are discussed by counsel. The most important of them are based upon the theory that defendant signed the note as surety only; and, in view of the special findings of the jury, they are not material in this case. There was evidence sufficient to sustain the special finding, and also the general verdict. We find no prejudicial error in any of the matters discussed. The judgment of the district court is therefore

AFFIRMED.

MARSHALL V. MARSHALL *et al.*

Deed: FATHER TO SON: UNDUE INFLUENCE: RESCISSION. An aged father, upon the loss of his wife, conveyed his farm and other property to his son in consideration of a stipulated annuity and support of himself and another for life. The contract was not unreasonable in itself, and was not dictated by the son, and the evidence failed to establish the claim that the father was incapacitated at the time to make it. Neither was it shown that the son failed to perform his part of it in good faith. It appears, however, that there was a conflict between the parties as to the quality of the support which the son was furnishing, and the father soon left the son's house and went to live with a daughter, but the other person who was to be supported was satisfied, and remained with the son. *Held* that the evidence did not warrant a rescission of the conveyance on the ground of incapacity, undue influence, and failure on the son's part to perform the contract.

Appeal from Delaware District Court.—HON. CARL F. COUCH, Judge.

FILED, SEPTEMBER 7, 1888.

ACTION in equity to set aside a conveyance of real and personal property, and for other relief. The district court rendered a decree setting aside the conveyance, as prayed. The defendants appeal.

Blair & Dunham, for appellants.

Bronson, Carr & Le Roy, for appellee.

ROBINSON, J.—The defendants are husband and wife. The plaintiff is the father of the defendant John Marshall, Jr., and was seventy-five years old on the tenth day of January, 1886. About the twenty-seventh day of August, 1885, his wife died, and on the tenth day of the next month he executed the instrument in controversy. It conveyed to his son ninety-five acres of land, and a wagon and farm machinery. The value of all this property was about three thousand dollars, and the consideration for it named in the conveyance was an agreement on the part of the grantee to pay to the grantor one hundred dollars per year during his lifetime, and to "keep and support grantor, in addition to above sum, during his natural life, in a good and comfortable manner, giving him good food and shelter, and a good room in the new house." Also to "support and keep, during her natural life, one Anna Maria Ulrich, in a good and comfortable manner." Also to pay the sum of three hundred dollars to the daughters of the grantor, within two years after his death. After this instrument was executed the plaintiff and Mrs. Ulrich made their home with defendants until the latter part of December, 1885, when the plaintiff left, and made his home with a daughter. Mrs. Ulrich continued to reside with defendants. The plaintiff alleges that when said instrument was executed his mind was so impaired by the infirmities of age, physical debility, and grief at the loss of his wife, as to render him wholly incapable of managing his affairs; that his son had managed his business and acted as his counselor; and that the instrument was procured through the undue influence of the son and the mental incapacity of the plaintiff. He further alleges that the son has failed to perform on his part the requirements of said instrument; that he failed to furnish plaintiff suitable food, and ill treated both plaintiff and Mrs. Ulrich.

I. The determination of this case depends chiefly upon questions of fact. There is much conflict in the evidence, but, after reading it with care, we have reached the conclusion that the preponderance is with appellants on all material issues. The transaction involved in this

case is, in its main features, not an uncommon one. The father, made homeless by the death of his wife, and feeling the effects of age, sought to provide for himself, and for a dependent sister of his deceased wife, a home and the comforts of life during their remaining years, and for that purpose conveyed to the son substantially all his property. The son accepted the trust, and undertook to discharge it. As soon as the agreement was made, and its execution entered upon, the interests of the parties to it seemed to conflict. It appeared to be to the interest of the father to obtain as much, and to the interest of the son to yield as little, as possible in carrying out the agreement. When such an apparent conflict of interests exists, more than ordinary care is required to prevent jealousies and ill-will. It often happens that interested relatives and others busy themselves in fomenting discord, and we think it is a matter of common knowledge that transactions of this character are rarely carried out to the full extent contemplated by the parties, without trouble of some kind. But the fact that unpleasant results are apt to follow agreements of the kind in question affords no sufficient ground for setting them aside. If they are entered into voluntarily by parties competent to contract, with knowledge of all material facts, and without fraud, they must be sustained. In our opinion the plaintiff has failed to overcome the presumption which exists, in the first instance, that he was competent to contract, and that the instrument in question was his free and voluntary act, and valid. Numerous witnesses, it is true, testify that he had not been considered capable of transacting business for years. Most, if not all, of these are interested relatives. As many or more witnesses testify that plaintiff was of sound mind, both before and after the death of his wife, and that he transacted business habitually. These are chiefly disinterested witnesses, and their testimony seems to us to be the more credible. The agreement itself, although possibly unwise, was not unnatural, and its terms are not such as to suggest unfairness. At the time it was made, the plaintiff had one son, the defendant John, and five

daughters, all of whom were married. The son had worked at home until he was of age, and some of the evidence tends to show that plaintiff thought that he was justly entitled to more of the property than the daughters. Mrs. Ulrich was partially disabled from taking care of herself, and had been an invalid for years. The supporting of these two persons, and the payment of one hundred dollars each year, was certainly a considerable tax; and the length of time during which this would have to be done was necessarily uncertain. It seems to us that the agreement was in itself reasonable and just. It was drawn by one in whom plaintiff seems to have confidence, and who seems to be worthy of it. It was dictated by plaintiff, and carefully read and explained to him before he signed. The only suggestion made by the son while it was being prepared was that certain property which the father wished to be included should be omitted. The scrivener testifies that he had known plaintiff for ten or eleven years, and that at the time of executing the instrument the condition of his mind was good, and as clear as it used to be. We think the agreement must be sustained. *Gardner v. Lightfoot*, 71 Iowa, 577.

II. The evidence fails to show that the son violated the agreement. The only complaint made by plaintiff when he left the house of defendants was that he didn't like the coffee. It is shown that this was good. It is also shown that the treatment of both plaintiff and Mrs. Ulrich was good, and that Mrs. Ulrich was entirely satisfied. We conclude, therefore, that the decree of the district court must be

REVERSED.

SHERMAN V. SHERMAN.

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1. **Gift**: EVIDENCE: PRIOR DECLARATIONS OF INTENT. Plaintiff and defendant are brothers, and the former held the latter's note for a sum of money loaned to him. In an action on the note, defendant claimed that plaintiff had given the note to him, and this was the only issue in the case. Defendant was allowed to introduce evidence of plaintiff 's declarations of his intention to execute the gift. made prior to the time of its alleged execution. *Held* that this testimony was properly admitted, but that it was error afterwards to exclude evidence of other declarations of plaintiff, made to a third person only a few hours prior to the time of the alleged execution of the gift, in which he expressed his intention to insist upon the payment of the note.

2. ——— : ——— : IRRELEVANT MATTERS. In such case evidence as to the amount of interest included in the note, and as to when the money was loaned, or what plaintiff had given to other relatives, was irrelevant to the issue.

Appeal from Jasper District Court.—HON. W. R. LEWIS, Judge.

FILED, SEPTEMBER 7, 1888.

ACTION on a promissory note for upward of seven thousand dollars, executed in 1880 by the defendant, and payable to the plaintiff, with interest at eight per cent., which note, the plaintiff alleged, had been obtained from him by the defendant by fraud. The defendant admitted the execution of the note, and pleaded that in 1886 the plaintiff had made a voluntary gift of the note to him. Trial by jury, verdict for the defendant, judgment, and the plaintiff appeals.

Winslow & Varnum, for appellant.

E. J. Salmon, *Kerr & McElroy* and *John F. Lacey*, for appellee.

SEEVERS, C. J.—I. The defendant conceded in open court that the plaintiff was entitled to recover

1. GIFT: evidence: prior declarations of intent.

unless he succeeded in establishing that the note in controversy had been given to him, assumed the burden of such issue, and, to sustain it, introduced evidence tending to show that, several times between the date of the note and the claimed gift, the plaintiff stated that he did not expect the defendant to pay the note, and that he expected to make him a gift of it. The evidence tended to show that the plaintiff and defendant had some conversation about other notes, and that the latter asked the former what he was going to do with the note in question, and said: "You have always told me you never expected me to pay it. I would like it now, and if you expect to make me a present of it, give it to me now." The plaintiff replied, "Well," and "went up stairs, came down with the note, and gave it to the defendant," and almost immediately thereafter went to the train and started to Ohio. The plaintiff, at the time of the trial in 1887, was about seventy-two years old, and he and the defendant are brothers. The evidence tends to show that the plaintiff had loaned his other brothers different sums of money, and that there was some controversy or anxiety between his brothers and sisters in what manner he would divide his estate between them. On the morning of the day the gift is claimed to have been made, the plaintiff was at the house of W. R. Mathews, his brother-in-law, and, when sitting in a room in Mathews' house, he called the latter to him. The plaintiff then had the note in question in his hand, and when he went away he folded it up and put it in his pocket. There was evidence tending to show the facts above stated. Thereupon the plaintiff asked Mathews, "What did he say he was going to do with the note?" This question was objected to, and the objection sustained. Thereupon the plaintiff offered to prove by the witness "that he, on the morning that it is claimed by the defendant that the note was given to him, and about two hours prior thereto, in the presence of the witness W. R. Mathews, declared that he was going to Thomas Sherman with that note, and have a credit

placed upon it, and if he did not in some way adjust the note he would collect it by legal means." The court refused to permit the proposed evidence to be introduced, and in so ruling the appellant insists the court erred. The only object of the evidence introduced by the defendant tending to show that the plaintiff at some future time intended to give the note to the defendant was to strengthen and increase the probabilities that the gift was made at the time and as claimed by defendant. Such evidence tended to show an intent to give only, and without more did not tend to establish the defense relied on. An unexecuted gift, it will be conceded, is not valid. In fact, it cannot exist. But the evidence was material as showing an intent to give, and therefore had an important bearing on the question whether such intent had been consummated. The evidence proposed to be introduced had just an opposite tendency, and made it probable that, while the plaintiff may have had the intent to make a gift, such intention had been changed, and that about two hours prior to the time the gift is claimed to have been made the plaintiff intended not to make a gift, but to insist on the payment of the note. Was the proposed evidence admissible? Counsel, for the appellee insist it was not, because it was a declaration in favor of the plaintiff, and against the interest of the defendant. The declaration preceded the gift, and was prior to the time any right had vested in the defendant, and we think the evidence was explanatory of the prior declarations of the plaintiff that he intended to give the note to the defendant. The intent of a person to do or not to do any given thing can only be shown by his acts, declarations and conduct, and when declarations are introduced in evidence tending to show such intent, other and subsequent declarations tending to show a contrary intent, made prior to the consummation of the act, are admissible for the purpose of enabling the jury to determine what in fact the intent of the person was, and thus making it probable or improbable that the act, whatever it may be, in controversy was consummated in accordance with the

expressed intent of the party. This class of evidence constitutes an exception to the general rule, and may or may not be admissible, according to the circumstances of each particular case. It is difficult to establish a general rule applicable to all cases. The circumstances under which the declaration is made, its possible object, and whether made with an evident design and purpose, may affect its admissibility, and certainly will have an important bearing on the weight to be attached thereto. In the case at bar we discover no suspicious circumstances indicating an object or purpose on the part of the plaintiff except to express to a relative, with whom he was visiting, his then intention in relation to the note, and what he intended to do with it, contradictory of and to any previous intent he may have had to give it to the defendant. Of course, if a controversy had arisen at the time the declaration to Mathews was made between these parties as to the proposed gift or intention to do so, if such intent amounted to a vested right, —a different rule might prevail. The foregoing views, to a greater or less extent, are sustained by the following authorities: *Darby's Adm'r v. Rice*, 2 Nott & McC. 596; *Miller v. Eatman*, 11 Ala. 609; *Stone v. Stroud*, 6 Rich. Law, 306; *Whitney v. Wheeler*, 116 Mass. 490; *Whitwell v. Winslow*, 132 Mass. 307; *Joyce v. Hamilton*, 111 Ind. 163; *Shailer v. Bumstead*, 99 Mass. 112; *Barthelemy v. People*, 2 Hill [N. Y.] 248, note. Counsel for the defendant have cited many cases in support of their theory, but we think they are all distinguishable. In some the declaration was subsequent to the gift, and in none of them, we think, was the declaration sought to be introduced in evidence because contradictory to or as bearing on the question as to the existence of an unexecuted intent.

II. It will be observed that the only issue was whether there was an executed gift; but we think evidence was admissible tending to show that at various times the plaintiff had expressed an intention to give the defendant the note in question. To some extent, at least, it tended to explain and

2 —: —: Irrelevant matters.

had a bearing on the question whether a gift was afterwards made. But we are unable to see the materiality of evidence showing the amount of interest included in the note, or when the plaintiff let the defendant have the money for which it was given, or what he had given his other relatives. Such evidence had no tendency to establish the gift in question. The instructions, counsel for appellant concede, "as a rule were full and fair," and yet they are criticised in connection with those asked and refused. We think the criticism is not well founded, and find no error in the record, except as above stated. Motions to strike amended abstracts and arguments from the files we do not deem it necessary to determine.

REVERSED.

YOUNG *et al.* v. THE WEBSTER CITY & SOUTHWESTERN RAILWAY COMPANY *et al.*

1. **Railroads**: FORFEITURE OF FRANCHISES BY NON-USER: WHAT IS NOT. The defendant company did not begin to build its railroad until more than two years after its organization, nor did the subscribers to the capital stock sooner pay up their subscriptions and take certificates of stock; but the company was continuously engaged in efforts, requiring the expenditure of money, to procure the additional means necessary to build the road. *Held* that these acts were such an exercise of its franchises as would prevent a forfeiture under section 1079 of the Code.

2. ——: TAX IN AID OF: VALIDITY: PROMISES TO REMIT TAXES: EVIDENCE. The claim that a tax voted to aid the defendant company in the construction of its road was invalidated, under section 3, chapter 159, Laws of 1884, on the ground that the company procured the tax to be voted by promising taxpayers to remit their taxes, *held* not to be sustained by the evidence.

3. ——: ——: ——: COMPLIANCE WITH TERMS. The condition on which a tax was voted to aid in the construction of defendant's road was that the road should be built from a given point to some point of intersection with another road, so that there would be a continuous line of road to a named station on such other road. *Held* that this did not require that defendant should build a continuous line of road from the given point to such station, but that it was sufficient that such station might be reached by a continuous line by the use of the line of such other road from the point of intersection to such station.

4. ——— : ——— : CITY IN TOWNSHIP : BY WHOM VOTE TO BE ORDERED. Where there is a city within the limits of a township, but not coterminous with the township, the township trustees may order the submission of the question whether the township, including the city, will vote a tax in aid of the construction of a railroad.

5. ——— : ——— : ORDERING ELECTION : TOWNSHIP TRUSTEES : POWER OF MAJORITY : NOTICE TO THE OTHER. Where called meetings of boards of trustees or other bodies are necessary, it is not required, in the case of the absence of members, that the meetings be deferred until their return, in order that they may be notified thereof, but the majority may act without such notice. So *held* where two of the trustees of a township, without notice to the third one, who was absent from home, in a called meeting, ordered an election upon the question of voting a tax in aid of the construction of a railroad.

Appeal from Hamilton District Court.—HON. S. M. WEAVER, Judge.

FILED, SEPTEMBER 7, 1888.

THIS is an action in equity, the object of which is to restrain the collection of a tax levied to aid in the construction of the Webster City and Southwestern Railroad, upon the grounds that said tax is illegal and void. There was a full trial in the district court, and the petition of the plaintiffs was dismissed. They appeal.

W. J. Covil, for appellants.

Chase & Chase, for appellees.

ROTHROCK, J.—I. The Webster City and Southwestern Railroad Company was duly incorporated in the month of September, 1883. The object and purpose of the incorporation was to build a railroad from Webster City to certain coal mines on the Des Moines river, in Webster county. The company was organized by W. C. Wilson, Jacob M. French and S. B. Rosenkrans, who each subscribed five thousand dollars to the capital stock of the company. They were all residents of Webster City, and in its inception the enterprise was purely local. It was not supposed that a sufficient sum of

1. RAILROADS : forfeiture of franchises by non-user: what is not,

money could be raised by subscriptions to the capital stock by persons resident of Webster City to construct the road. A survey of the proposed road was made, the expense of which was paid by the stockholders; and the township of Boone, in October, 1883, voted a three per cent. tax to aid in the construction of the road. Afterwards efforts were made to secure aid by taxation in other townships, which failed; and, after active efforts on the part of the company to secure aid to build the road, but without success, in September, 1884, the company released the three per cent. tax which had been voted in Boone township. During the year 1885 the board of directors of the company held meetings to devise ways and means to proceed with the enterprise. About the fifteenth day of February, 1886, petitions were put in circulation for an election in Boone township for a tax of five per cent. to aid in building the road. A majority of the resident freehold taxpayers signed the petition. An election was ordered and held, at which a large majority of the legal voters voted in favor of the tax. The road was built, and the township trustees certified that the company had earned the tax, and it was levied by the board of supervisors. It is claimed by the appellants that the tax is illegal and void upon several grounds, which we will proceed to examine.

It is insisted that the Webster City and Southwestern Railway Company had ceased to exist as a corporation before the tax in question was voted. The claim is based upon section 1079 of the Code, which is as follows: "Any corporation, organized in accordance with the provisions of this chapter, shall cease to exist by the non-user of its franchises for two years at any one time; but such body shall not forfeit its franchises by reason of its omission to elect officers, or to hold meetings at any time prescribed by the articles of incorporation or by-laws, provided such act be done within two years of the time appointed therefor." If we were to concede that the mere non-user of the franchises of the company for two years would avoid the tax, without a judgment

of forfeiture by a competent court (a question which we need not determine), the evidence in the case falls far short of showing that there was such non-user for the time provided by the statute. It is true, the company was incorporated in September, 1883, and it did not commence to build its road until April, 1886, a period of more than two years ; but the law does not provide that a railroad company shall forfeit its charter if it does not commence the building of its road within two years after it acquires its charter rights. It may use "its franchises" as effectually in raising means to build its road, in making preliminary surveys, and in many other ways, as it can in grading and laying ties and iron. Bromin defines a franchise to be "a particular privilege conferred by grant from government, and vested in individuals." "The corporation itself is not a franchise, but it is the attributes of the corporation which comprise the franchises thereof,—its special powers and rights." 1 Wood, Ry. Law, sec. 14, p. 27. Now, it is perfectly apparent that any acts done to further the objects of the corporation are the exercise of its franchises. The record shows the expenditure of money and efforts made to procure additional means to construct the road, and that such efforts were continuous and persistent. The fact that the subscribers to the capital stock did not pay up their subscriptions, and take certificates of stock, was not a non-user of the franchise or right to build the road.

II. It is next claimed by appellants that the defendant company procured the tax to be voted by promising taxpayers to remit their taxes. If this claim is well founded, the tax is void. It is expressly so provided in section 8, chapter 159, Acts Twentieth General Assembly of this state. But a careful examination of the evidence demonstrates that this claim is without foundation. There is a clear preponderance of the evidence to the effect that no taxpayer was induced to either sign the petition or vote at the election for the tax upon any offer or promise of exemption from payment by any officer

2. —: tax in aid of: validity: promises to remit taxes: evidence.

or agent of the company, or by any other person. We need not set out nor discuss the testimony of the witnesses upon this question. It is enough to say that there is no ground for sustaining the claim.

III. It is next insisted that the road has not been constructed as required by the petition and notice. It is not claimed that the road that was actually constructed was not finished before the time named in the petition and notice. The question involves a construction of the notice for the election so far as it pertains to the line of road to be aided by the tax. The parts of the notice upon which the question arises are as follows: "At said election the question will be submitted to the voters of said township of aiding said railroad company in the construction of its railroad between Webster City, Iowa, and a point on the line of the Webster City & Crooked Creek Railroad, in the county of Webster, in the state of Iowa, by the levy and collection of a five (5) per cent. tax on the taxable property in the said township of Boone, which said tax shall be levied at the time of levying the ordinary taxes of 1886, on the valuation of 1886, at the rate per centum aforesaid; and said tax shall be collected at the time of collecting the ordinary taxes of 1886, and paid over in one year, and the amount of work upon said proposed railroad line required to be completed before said tax shall be paid to the said railroad company shall be as follows, to-wit: Said railroad shall be completed, and the depot of said company located and built within one-half mile of the courthouse in Webster City, Iowa; and the work shall be performed between said depot and a point on the Webster City & Crooked Creek Railroad, so as to make a continuous line of railroad from the coal mines at Crooked Creek to Webster City. Said road is to be built standard gauge and laid with fifty-pound steel rails substantially similar to those used on the Northwestern Railway; and said road shall be fully completed, so that trains can be run over the same from said depot to Lehigh, before said tax shall become due, collectible and payable; and said aid

8. ——: ——: ——: compliance with terms.

and tax, if voted and given to said railroad company, is voted and given under an express agreement by said company that said line of road between Webster City and said point on the Webster City & Crooked Creek Railway in Webster county shall be run and operated as a continuous line, from Webster City to the coal mines at Crooked Creek; and said company shall always maintain and keep a depot for the transaction of its business for the convenience of the people of Webster City, at some point in said city not more than half a mile from the courthouse; and if the road is not completed between the points named, and the depot built and established, as herein provided, by the first day of September, A. D. 1886, so that a railroad train is run over the entire length of said line from Lehigh to Webster City by that date, then the tax shall be void; and no tax shall be levied in aid of said railroad company unless said railroad is built as above stated, and within the time named, which shall be evidenced by running a train or trains over the entire length of said line by said first day of September, A. D. 1886." It should be stated that some years before the defendant company was incorporated, the Webster City & Crooked Creek Railroad was built from a point on the Illinois Central Railroad west of Webster City, to the coal fields which the projectors of the defendant company desired to reach with its road. The first-named road ran south from the Illinois Central line, and the defendant's road was built southwest from Webster City to a junction with the Crooked Creek road, some two or three miles north of Lehigh. The contention of the plaintiffs is that under the notice the defendant company was bound to build a continuous and independent line of railroad to Lehigh. Without elaborating this question, we deem it sufficient to say that we do not think this is a proper construction of the notice. The requirement is that the road is to be built to a point on the Webster City & Crooked Creek Railroad, in the county of Webster. The place at which the junction is to be made is

not designated in the notice. The object was to have a continuous line of railroad from Webster City to the Crooked Creek coal fields at Lehigh. If it was intended that a new line of road should be built from the junction with the Crooked Creek road, surely apt words would have been used to express that intention, and there would have been no necessity of providing for building to a point on that road; and when a junction with that road is made, there is a continuous line of railroad from Webster City to Lehigh. We think that the township trustees properly construed the notice when they certified that the defendant company had complied therewith by building the line to a point on the Crooked Creek road.

IV. Another objection to the validity of the tax is that Webster City is within the township of Boone, and the election should have been ordered by the corporate authority of the city. It is sufficient to say of this objection that the boundaries of the city and the township are not the same. The township embraces territory not within the corporate limits of the city. In such case the township trustees are the proper persons to order the election.

4. —: —: city in township: by whom vote to be ordered.

V. There were but two of the township trustees present at the meeting at which the petitions for the election were presented and considered, and but two joined in issuing the notice of the election. The evidence shows without question that the petitions presented to the trustees contained the names of quite a large majority of the resident freehold tax payers. It was therefore the duty of the trustees to order the election. If they had refused to do so, they could have been compelled to act by *mandamus*. Appellants contend that the tax is void because the third trustee was not present at the meeting, and was not notified that a meeting would be held. The meeting at which the action was taken was not a regular meeting provided for by law; it was a called meeting. We do not understand that counsel claim that a majority of

5. —: —: ordering election: township trustees: power of majority: notice to the other.

the trustees could not act legally in the premises. But it is claimed that all of the trustees should have had notice of the meeting. It is claimed by the defendants that the evidence shows that the absent trustee could not have been notified of the meeting, because on that day he was absent from the township. It appears that the person who was designated to give the notice learned *upon* inquiry that the trustee was absent, and we think the claim that he was actually out of the township is *fairly* sustained by the evidence. In such case no notice could be given, and we think that the acts of the majority were valid. It is neither charged nor shown by evidence that any fraud was intended by any one in presenting the petitions to the two trustees; on the contrary, the testimony is absolutely conclusive that a majority of the resident freehold taxpayers petitioned for the election, and it was the duty of the trustees to order the same. Where called meetings of boards of trustees or other bodies are necessary, it is not required that, in case of the absence of members, meetings must be deferred until their return, in order that they may be notified thereof. All that can reasonably be required is that notice be given to those upon whom service could be made. We think that no valid reason appears upon this record why this tax should not be paid.

AFFIRMED.

WHEELOCK V. MADISON COUNTY.

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Criminal Law: COSTS OF DEFENDANT'S WITNESSES: WHEN TO BE PAID BY COUNTY. Under chapter 207, Laws of 1880, when the court or judge, prior to the trial of a criminal case, upon the application of defendant, and a showing as to the materiality of witnesses for defendant, orders such witnesses to be subpœnaed, and they are subpœnaed, the county becomes liable for their fees and mileage, without any order to that effect being made at or subsequent to the trial; but, as held in *Jones County v. Linn County*, 68 Iowa, 63, the order may also be made at the trial, or when judgment is pronounced.

Appeal from Madison District Court.—HON. JOHN H. HENDERSON, Judge.

FILED, SEPTEMBER 7, 1888.

PLAINTIFF is the assignee of a number of claims against the county for the fees and mileage of witnesses for the defense in criminal causes. The board of supervisors refused to allow the claims. This action was brought to enforce payment. The district court sustained a demurrer to the petition, and plaintiff appeals.

Ruby & Wilkin, for appellant.

John A. Guiher, for appellee.

REED, J.—It is alleged in the petition that in each of the causes in which the fees in question accrued the witnesses were subpœnaed upon the order of the court or magistrate before whom the causes were pending and tried, and that such orders were made upon a satisfactory showing that the testimony of the witnesses was material to the defense. Also that in each case the defendant was convicted, or held to answer any indictment that might be found against him. The case calls for a construction of chapter 207, Laws Eighteenth General Assembly. The chapter is entitled "An act to repeal section 3818 of the Code, in relation to the payment of witnesses for the defendant in criminal cases, and to enact a substitute therefor;" and its provisions are as follows: "Section 1. That section 3818 of the Code is hereby repealed, and the following enacted as a substitute therefor, to-wit: 'Sec. 2. In no criminal case shall witnesses for the defense be subpœnaed at the expense of the county, except upon order of the court or judge before whom the case is pending; then only upon a satisfactory showing that the witnesses are material and necessary for the defense; and the board of supervisors shall in no case audit or allow any claim for witness fees for the defendant in criminal cases, except upon order or judgment of court or judge thereof,

and such order may be made at the time of trial or other disposition of the case, and upon such showing as the court may require.'" The section repealed by the act was as follows: "In all criminal cases the fees of witnesses for the defense shall be paid by the county." There is no averment in the petition that the court or magistrate made any further orders with reference to the matter after those for the subpœnaing of the witnesses; but the question of the liability of the county depends entirely upon the sufficiency of those orders to fix its liability. It will be observed that there are no words in the act expressly declaring that the county shall in any case be liable for the fees; but its liability upon the happening of the prescribed condition arises by necessary implication, for the command to the board of supervisors not to audit or allow the claim except upon the happening of the condition named is necessarily a direction to allow them when that condition has been complied with, for otherwise the whole section would be without force or meaning. The question, then, is as to the particular matters which the general assembly intended to prescribe as the condition upon which the county would become liable. It must be admitted that the language of the act fails to express the legislative intent with that clearness which is desirable. In interpreting statutes it is always important to consider what the law was before their enactment, and what particular evils or wrongs were intended to be remedied by them. Before the enactment of this statute the defendant in a criminal cause could at his pleasure subpœna any number of witnesses, and the county was liable for their fees and mileage, whether their testimony was necessary or material to his defense or not; and the county was in that manner often burdened with unreasonable and needless costs. That was the wrong intended to be remedied by the enactment; and, when the language of the act is examined, it is to be gathered from it that the intention was (1) that the county was to be liable for the fees of such witnesses only as should be material for the defense; and (2) that the question of materiality

was to be determined by the order or judgment of the court. But when is that determination to be made? We think it may be made in advance of the trial, and when the witnesses are to be subpœnaed. A number of reasons support that view. The order may be made by the judge. It is also to be made upon a satisfactory showing that the witnesses are material to the defense. Now, if it is to be made only after the trial, and as part of the final order or judgment in the case, neither of these provisions was necessary, for in that case the order would be made by the court, and, the judge having heard the evidence, there would be no necessity for any showing as to its materiality. Some force must be given to these provisions in construing the act. But if the construction contended for by the county is the true one they are meaningless. That the order may be made at the trial, or when judgment is pronounced, is also true. We so held in *Jones County v. Linn County*, 68 Iowa, 63. But it does not follow that it cannot be made at an earlier date in the progress of the case. As we understand this record, the court in the cases in question was applied to by the defendants, before the cases came on for trial, for orders for the subpœnaing of their witnesses at the cost of the county, and accompanied the application with a showing as to the materiality of the witnesses; and the court, upon that showing, made the order; and that, we believe, is the common practice. The court having thus once determined the question of materiality, there clearly could be no necessity for again considering it; and there is nothing in the act requiring us to hold that such determination is not conclusive. It was contended in argument that the first provision of the second section, viz., that with reference to subpœnaing witnesses at the expense of the county, related alone to the expense attending the subpœnaing, such as the fees for serving the process and the like. But that idea is excluded by the title of the act, if not by its language. The title indicates the subject to which the act relates, and under the constitution (art. 3, sec. 29) no subject not expressed in the title can be embraced in the

act. It is clear that the title embraces but the one subject, namely, "the payment of witnesses for the defendant in criminal cases." We think the district court erred in sustaining the demurrer.

REVERSED.

BOYD V. MOATS *et al.*

Accord and Satisfaction: CONSIDERATION: PAYMENT BEFORE DUE. An offer to pay less than the whole amount of a debt before due in full satisfaction thereof, and an acceptance of the offer, and payment accordingly, constitute an accord and satisfaction, supported by a good consideration.

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Appeal from Wright District Court.—HON. S. M. WEAVER, Judge.

FILED, SEPTEMBER 8, 1888.

ACTION on a promissory note. As a defense the defendants pleaded accord and satisfaction. The court directed the jury to find for defendants, and judgment was accordingly entered, and plaintiff appeals.

Aaron Yearous, for appellant.

Nagle & Birdsall and *F. W. Pillsbury*, for appellees.

SEEVERS, C. J.—The facts pleaded and relied on by the defendants to establish an accord and satisfaction are that prior to the maturity of the note they wrote the plaintiff, offering to pay one hundred and fifty dollars in full satisfaction of the note, and that the plaintiff accepted the offer, and defendants complied therewith by paying said amount to Odenheimer, Miller & Co., bankers, as directed by the plaintiff. The plaintiff, in his reply to the answer, admitted writing the letter, but says no compromise was made, and said Odenheimer, Miller & Co. were not the agents of the plaintiff. And it was further pleaded in the reply that the plaintiff was induced to take less than the amount due on the note because of certain false and fraudulent statements written by defendants to plaintiff; that plaintiff wrote

Odenheimer, Miller & Co. that he had received a letter from defendants, offering one hundred and fifty dollars in full satisfaction of the note, and authorizing them to take that amount, clear of expenses, and directed them to send the one hundred and fifty dollars to him. The plaintiff complied with this offer before the note was due. There is no controversy as to the foregoing facts; and, as the defendants paid the money as directed by the plaintiff, before the note was due, the accord and satisfaction is complete. It is supported by a sufficient consideration, and that is the payment before the note became due and payable. All the authorities so hold. The only remaining question is, did the defendants make any false representations? There is no evidence tending to prove that the representations made were false or fraudulent. Therefore the court properly directed the jury to find for the defendants. This disposition of the case renders it unnecessary to consider the errors assigned in relation to the admission and rejection of evidence.

AFFIRMED.

75	152
105	638
75	152
128	640
75	152
140	84

FERNEKES & BROS. v. CASE *et al.*

Statute of Limitations: COMMENCEMENT OF ACTION: DEFECTIVE NOTICE. An original notice in an action on account was placed in the hands of the sheriff, and was duly served, May 1, 1886. On the twenty-fourth of the next month the action would have been barred by the statute of limitations. The notice was defective in that it required defendants to appear at the next August term of the circuit court, which it stated would begin on the thirtieth day of August, when in fact it began on the thirty-first day of August. At this term there was no appearance, and the cause was continued, and another notice served on defendants. *Held* that the defect in the first notice was fatal, and that the beginning of the suit dated from the time the second one was placed in the hands of the sheriff and that, therefore, the action was barred. (See cases cited in opinion).

Appeal from Dickinson District Court.—HON. GEORGE H. CARR, Judge.

FILED, SEPTEMBER 8, 1888.

THIS is an action upon an account for goods and merchandise sold and delivered. There was a demurrer to the petition, which was sustained, and plaintiffs appeal.

J. W. Cory, for appellants.

Orson Rice and *Parker & Richardson*, for appellees.

ROTHROCK, J.—I. The last item of the account upon which the action was brought was dated June 24, 1881. The cause of action would therefore have been barred on the twenty-fourth day of June, 1886. Code, secs. 2529, 2531. An action is deemed to be commenced, within the meaning of the statute of limitations, on the day when the original notice is delivered to the sheriff for service with intent that it be served immediately. Code, sec. 2532. The original notice in this case was delivered to the sheriff, and was served upon the defendants on the first day of May, 1886. This was within the five years' limitation fixed by statute. The notice required the defendants to appear and defend before noon of the first day of the August term, 1886, of the circuit court of Dickinson county, to commence on the thirtieth day of August, 1886. The judges of the district had made a .rule that all parties should appear before noon of the first day of the term to which they were cited to appear. The August term, 1886, of said circuit court did not commence on the thirtieth day of that month. It commenced on the thirty-first day of the month. The notice, in so far as it fixed the date of the commencement of the term, was founded in mistake, and might be said to be misleading. The cause was continued at the August term, and another original notice was served upon the defendants. This last notice was delivered to the sheriff more than five years after the last item of the account accrued. The defendants appeared at the next term after the last-named notice was served, and demurred to the petition upon the ground that the action was barred by the statute of limitations. Appellant contends that the court erred in

sustaining the demurrer. We think the question must be determined by the proper effect to be given to the first notice, and the true inquiry is, did the first notice give the court jurisdiction of the defendants, so that if, at the August term, the court had rendered a judgment by default against them, the judgment would not have been void for want of jurisdiction? In other words, could a judgment by default have been questioned in any other way than by a motion to set aside the default, or by appeal or other direct proceeding? The statute requires that the original notice shall state the term at which the defendant is required to appear, naming it. The notice stated the term, but did not state the correct date at which defendants were required to appear. In this respect the case is precisely like *Boals v. Shules*, 29 Iowa, 507, in which it was held that the notice was insufficient. It is true, the question arose in that case upon a motion to set aside a default on the part of defendants. But in the subsequent case of *Haws v. Clark*, 37 Iowa, 355, the same question arose in a collateral attack upon the judgment, and it was held that the notice conferred no jurisdiction. And in the case of *Jones & McGee Lumber Co. v. Boggs*, 63 Iowa, 589, it was held that a notice which did not state the term of court at which the appearance was required did not confer jurisdiction. See, also, *Kitsmiller v. Kitchen*, 24 Iowa, 163. We think that it must be held that the first notice was not merely a defective notice, but that it lacked an essential requirement of the statute, and that it was no notice, and that the delivery of it to the sheriff, and its service, did not arrest the operation of the statute of limitations.

II. As the second notice was delivered to the sheriff, and served after the account was barred, the action was not commenced until that time, and the demurrer was properly sustained. See *Lumber Co. v. Boggs, supra.*

AFFIRMED.

SHULER V. DUTTON.

75 155
88 175
75 155
93 117
75 155
116 701

Sale: WRITTEN CONTRACT: INDEFINITE DESCRIPTION: PAROL TO AID. D. and Y. were partners, and as such owned a livery stock and barn, and also a stallion and a separate barn in which he was kept, and accounts due for his services. D. sold to plaintiff, describing the property in the written contract as follows: "The undivided one-half interest in the livery stock, horse, buggies, etc., of D. & Y." *Held* in an action by plaintiff to reform the contract, and to establish his ownership thereunder of one-half of all the firm property of D. & Y., that parol evidence was admissible to show the surrounding circumstances and the conduct of the parties, and thereby apply and ascertain the meaning of its uncertain terms (*County of Des Moines v. Hinkley*, 62 Iowa, 637); and that, this being done, it appears that the word "horse" in the contract referred to the stallion, and "etc." to the barn in which he was kept and the accounts for his services; and that plaintiff was properly entitled to relief accordingly.

Appeal from Grundy District Court.—HON. C. F. COUCH, Judge.

FILED, SEPTEMBER 8, 1888.

ACTION to establish plaintiff's ownership of certain personal property, and to reform a written contract for the sale thereof by the defendant to the plaintiff. The relief asked was granted, and the defendant appeals.

H. L. Huff and *Rea & Hayes*, for appellant.

M. J. Thompson and *Boies, Husted & Boies*, for appellee.

SEEVERS, C. J.—The defendant and one Yatter were partners, and as such owned a livery stock consisting of horses, buggies, etc., and also a barn, stallion, and certain moneys due them for the service of the latter. The plaintiff claims to have purchased said property. He claims that the contract was oral, but was reduced to writing, and that the writing does not in

specific and apt terms describe the property so that it can be identified. He further claims, however, that the property can, by parol evidence in aid of the writing, be accurately ascertained, and, this being done, he asks that his title thereto be established and confirmed. He further claims that by mistake the property was not properly described in the writing, and he asks that it be reformed, and the same measure of relief granted him. These claims of the plaintiff are sufficiently stated in the petition and amendments thereto, the allegations of which are denied by the defendant. There is some controversy in relation to the description of the property in the written contract, and the original has, by consent of parties, been certified to and is now before us, and we find the property described therein as follows: "I do hereby sell to Chris. C. Shuler the undivided one-half interest in the livery stock, horse, buggies, etc., of Dutton & Yatter." This contract was signed by both parties. The partnership then owned several horses, buggies, wagons, sleighs, harness, etc., used in the livery business, and also a stallion not so used, which was kept in a separate barn, and also moneys due for his service. The only question is whether the stallion, moneys due for his service, and barn, were included in the contract as made; and whether, if not sufficiently described in the writing, parol evidence is admissible to point out and identify it. The evidence is voluminous, and a careful consideration of it satisfies us that the oral contract which preceded the writing embraced and included the defendant's interest in all the partnership property, including the stallion, barn, and moneys due for service. We do not deem it necessary to set out the evidence. We feel well satisfied that our conclusion is correct. It is true, this property is not accurately or sufficiently described in the written contract. There were, we believe, seventeen horses used in the livery business. The term "livery stock," it is conceded, sufficiently indicates them. This being so, to what does the word "horse" apply? Certainly not to those used in the business. The partnership owned but one other

horse, and that was the stallion; and we have no doubt that the horse referred to in the written contract was the stallion. There was sold the undivided interest of the defendant "in the livery stock, horse, buggies, etc., of Dutton & Yatter." What was meant by the term "*etc.*," of Dutton & Yatter? It certainly refers to something owned by the partnership. The "livery stock" is sufficiently expressive as to include all the property used in that business. It is difficult to conceive from the writing alone that it means anything less than the interest of the defendant in the partnership property. Upon looking into the evidence, whatever doubt there may be on this subject is dispelled. We think the parties so intended and understood, and that, when the written contract is read in the light of the surrounding circumstances and the subject-matter, there is no doubt that the plaintiff purchased, and the defendant sold, all the interest of the latter in the partnership property of Dutton & Yatter. It is always competent, we think, to show by parol the surrounding circumstances, and the conduct of the parties, and thereby apply and ascertain the meaning of words and terms in a written contract which, on its face, is indefinite and uncertain. 2 Pars. Cont. 694; *County of Des Moines v. Hinkley*, 62 Iowa, 637. The judgment of the district court is AFFIRMED.

JOHNSON V. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

75 157
90 173

75 157
106 139

Railroads: COLLISION WITH HORSE AND WAGON ON DEPOT GROUNDS: CODE, SECTION 1289. Code, section 1289, providing a remedy for animals killed on railways at places where the companies have the right to fence but fail to do so, and upon depot grounds by trains operated at a speed exceeding eight miles per hour, applies only to stock running at large, and not to the case of a horse killed while being driven across the track upon the grounds of a depot. (Compare *Monahan v. Keokuk & Des M. Ry. Co.*, 45 Iowa, 523.)

Appeal from Webster District Court.—HON. S. M. WEAVER, Judge.

FILED, SEPTEMBER 8, 1888.

ACTION to recover damages for a horse killed and a wagon broken by a train on defendant's road, when being driven by plaintiff across defendant's tracks within the limits of the depot grounds. Trial by jury. Under direction of the court the jury rendered a verdict for defendant, and plaintiff appeals.

Wright & Farrell, for appellant.

J. C. Cook, for appellee.

SEEVERS, C. J.—The only ground of negligence stated in the petition is that defendant's train which caused the injury was being operated and run at a rate of speed exceeding eight miles an hour. It is provided by statute that any "corporation operating a railroad that fails to fence the same against live stock running at large, at all points where such right to fence exists, shall be liable to the owner of any stock injured or killed by reason of such want of fence, for the value of the property or damage caused, unless the same was caused by the wilful act of the owner or his agent; and in order to recover it shall only be necessary for the owner to prove the injury or destruction of his property: * * * provided, * * * the operating of trains upon depot grounds necessarily used by the company and public, where no such fence is built, at a greater rate of speed than eight miles an hour, shall be deemed negligence, and render the company liable, under this section." Code, sec. 1289. As the horse killed was not running at large, the material inquiry is whether the plaintiff was entitled to recover under this section. This inquiry must be answered in the negative. It seems to us that it is not possible to construe the statute otherwise. This is what the statute plainly says. The only liability under it is for stock injured or killed which is running at large. *Monahan v. Keokuk & Des M. Ry. Co.*, 45 Iowa, 523. As this view is in accord with the ruling of the district court, the result is that the judgment must be

AFFIRMED.

75 159
78 16

CHASE V. WESTON.

1. **Judge : UNCLE OF PLAINTIFF : DISQUALIFICATION : WAIVER.** Plaintiff brought his action for an injunction in the district court, one of the judges of which was his uncle, but he procured his tempoary injunction from one of the other judges of the district. He then let his case lie for nearly two years, when the defendant brought it on for trial at a term when plaintiff 's uncle was presiding over the court in that county. The plaintiff then moved to have the cause set down for trial on depositions and documentary evidence, which motion was overruled. He then moved for a continuance till the next term, and in his affidavit in support of his motion stated that the presiding judge was his uncle, and therefore prohibited from trying the case. This motion was also overruled. Plaintiff then moved for a change of forum, on the ground that the presiding judge was prejudiced against him, but he did not present the relationship of the judge as a reason for such change, nor did he at any time specifically call the court's attention to section 190 of the Code, under which he now insists that the judge was disqualified ; the only reference to that matter being in his affidavit for a continuance. The motion for a change of forum was also overruled, and upon a trial before the court judgment was rendered for the defendant, from which plaintiff appeals. *Held* that the judge, being related to the plaintiff in the third degree according to the civil law (2 Bl. Comm. 207 ; 2 Kent, Comm. 412), was, under section 190 of the Code, disqualified from the first to try the cause without the mutual consent of the parties, and that nothing done or omitted by plaintiff amounted to such consent on his part.

2. ——— : ——— : ——— : **TRIAL DE NOVO ON APPEAL.** As plaintiff in such case was entitled to a trial before a court of original jurisdiction, and as the trial below was *coram non judice*, and as this court has only appellate jurisdiction, *held* that a trial *de novo* could not be had in this court, but that the cause must be remanded for trial before a competent judge. (*County of Floyd v. Cheney*, 57 Iowa, 162, *distinguished*).

Appeal from Hamilton District Court.—HON. D. D. MIRACLE, Judge.

FILED, SEPTEMBER 8, 1888.

ACTION in equity to restrain the sale of real estate in satisfaction of a judgment alleged to be void. The petition was filed December 22, 1885, and a temporary writ of injunction was issued to restrain the sale. On the eighteenth day of February, 1886, an answer was filed, which denied the alleged invalidity of the judgment in question. On the eighth day of September, 1887, the defendant filed a notice to the effect that the cause would be brought on for trial at the term of court which commenced on the nineteenth day of that month. On the seventh day of October, 1887, when the case was reached for trial in its order, the plaintiff moved that it be set down for trial on depositions and documentary evidence, but the motion was overruled. On the same day plaintiff filed a motion for a continuance to the next term of court, which commenced on the twenty-first day of November, 1887, supported by his own affidavit. This was overruled. Plaintiff then filed a motion for a change of place of trial, on the ground that the judge of the court was prejudiced against him, supported by the affidavits of three disinterested persons. Counter-affidavits were filed, and the motion was overruled. Plaintiff was then ordered to proceed to trial at once. The case was tried to the court, and judgment rendered in favor of defendant. The plaintiff appeals.

Chase & Chase, for appellant.

Kamrar & Boeye, for appellee.

ROBINSON, J.—I. Appellant insists that the district court did not have jurisdiction to try this cause, against his objection, on account of the relationship of the judge of the court to plaintiff. He assigns errors, and does not ask a trial here *de novo*. It is shown by the affidavit in support of the application for a continuance, and is admitted by appellee, that the judge was the uncle of plaintiff. Section 190 of the Code is as follows: "A judge or justice is disqualified from acting as such,

1. JUDGE: uncle of plaintiff: disqualification: waiver.

except by mutual consent of parties, in any case wherein he is a party, or interested, or where he is related to either party by consanguinity or affinity, within the fourth degree, or where he has been attorney for either party in the action or proceeding. But this section does not prevent them from disposing of any preliminary matter not affecting the merits of the case." Degrees of consanguinity and affinity are to be computed according to the rule of the civil law. Code, sec. 45 (24). By that rule the judge was related to the plaintiff in the third degree. 2 Bl. Comm. 207; 2 Kent, Comm. 412. He was therefore within the prohibition of the statute. It is claimed by appellee that section 190 of the Code was not called to the attention of the district court, and it seems to be his thought that if the application for a continuance and for a change of forum were insufficient under the statutes relating to such applications, plaintiff waived the question of jurisdiction by failing to base his objections explicitly upon section 190. It may be conceded that the applications of plaintiff were not sufficient, under the statutes relating to continuances and changes of forum, and we are inclined to the opinion that section 190 escaped the attention of the trial judge. But we do not think that fact affects in any manner the rights of appellant. The district judge was disqualified from sitting on the trial of the case in the first instance, and the disqualification could be removed only by the mutual consent of parties. Stress is laid upon the conduct of plaintiff in regard to the trial. It is said that he permitted a large number of terms of court to pass without bringing the case on for a hearing; that he had due notice that the defendant would insist on a trial at that term of court; and that, notwithstanding these facts, he failed to take any steps for a continuance or change of forum until the sixteenth day of the term, when the case was reached for trial in its order. Whether the delay in bringing the case on for trial was the fault of plaintiff, we are not advised; but if we concede that it was, and that he was guilty of

gross negligence at the term at which it was tried, these facts would not amount to a waiver of his rights. Nothing but the mutual consent of both parties, or that which would in law amount to such consent, would remove the disability imposed by statute, nor do we think it was necessary for plaintiff to do more than to make the fact of the relationship a matter of record to preserve his rights, if the consent required by statute is not given. He made that fact known, and protested against and excepted to the ruling of the court directing him to proceed at once to trial. In our opinion it was the duty of the judge, having knowledge of the prohibited relationship, to refuse to act as judge on the trial of the cause until the required consent was given. It is the policy of the law to give to each suitor a fair hearing before an impartial and disinterested tribunal. Under a statute similar to that of Iowa, but which did not contain the consent clause, it was held that, jurisdiction having been prohibited by statute, it was not competent to confer it by consent of parties; and it was further said that the judge ought not to wait to be put in mind of his disability, but should himself suggest it, and withdraw. *Oakley v. Aspinwall*, 3 N. Y. 547; *Hibbard v. Odell*, 16 Wis. 635; *Hall v. Thayer*, 105 Mass. 224.

II. It is insisted by appellee that there is not such a failure of jurisdiction as to prevent a trial *de novo* by this court. But the case of *County of Floyd v. Cheney*, 57 Iowa, 162, cited by him, does not support his claim. In that case it was held that a judge, who had been an attorney in the cause, could render judgment where the consent of the judgment debtor might be presumed. The statute confers upon the judge jurisdiction to a limited extent in cases like this. He may dispose of preliminary matters not involving the merits; but if he attempts to do more than that without consent, he exceeds his jurisdiction, and his acts are illegal. This court has only appellate jurisdiction of the case at bar. It is the right of appellant to have it tried by a court of

2. —: —: —: trial de novo on appeal.

original jurisdiction, in the manner provided by law, and this right has been denied him. The judgment of the district court will therefore be reversed, and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

75 163
133 29

GROVE V. THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY.

Railroads: FAILURE TO FENCE: KILLING HORSES IN CHARGE OF DRUNKEN DRIVER. Horses hitched to a sleigh, and in charge of a driver who has become intoxicated and fallen into a drunken stupor, are not, when wandering about on the prairie, "stock running at large," within the meaning of section 1289 of the Code: and for the killing of such horses by a passing train at a place where it had the right to fence its track but did not, defendant was not liable under said section. (*Hinman v. Chicago, R. I. & P. Ry. Co.*, 28 Iowa, 494, *distinguished*).

Appeal from Hancock District Court.—HON. G. W. RUDDICK, Judge.

FILED, SEPTEMBER 8, 1888.

THIS is an action to recover double the value of two horses, which it is alleged were killed by a train of the defendant, at a point on its railroad where it had the right to fence its right of way and track, and failed to do so. There was a verdict and judgment for the defendant. Plaintiff appeals.

A. F. Call, for appellant.

E. B. Soper and *S. K. Tracy*, for appellee.

ROTHROCK, J.—The undisputed facts, as shown by the evidence, are, in substance, as follows: The plaintiff loaned his team to one Goeders, to go from Luverne to Livermore for a priest. Goeders hired one McCaffray to make the trip, and drive the team, which was hitched to a sleigh. McCaffray arrived at Livermore at about

dusk in the evening, and there remained until about ten o'clock in the night, when he started on his return to Luverne. While at Livermore he became very drunk, and shortly after leaving there he fell into a drunken stupor, and the team wandered off the road some two or three miles, and circled around on the open prairie, and brought up on the railroad track, and were struck by an engine and killed. McCaffray testified as a witness that he was in a profound sleep until after the team was killed. The statute provides that for a failure to fence a railroad the corporation operating the same shall be liable for damages done to "live stock running at large." Code, sec. 1289. The defendant moved the court to instruct the jury to return a verdict for the defendant, and the motion was sustained on the ground that the team was not running at large within the meaning of the statute. The question presented by the appeal is whether this ruling was correct. Counsel for appellant cites us to *Hinman v. Chicago, R. I. & P. Ry. Co.*, 28 Iowa, 494, and other cases determined by this court, and claims that, under the rule of the cited cases, the question as to whether the team was running at large should have been submitted to the jury. We do not think any of the cases relied upon sustain the claim of plaintiff. In all of them the animals were without a driver, and not under the control of any one. In the case at bar there was a driver in the sleigh. Plaintiff, in effect, contends that he was not a driver, because he was so drunk that he was insensible. We are, in effect, asked to hold that it is proper to consider the capacity of the driver in determining the question of whether the team was running at large. The law will not allow parties to enter upon any such an investigation. If it did, recovery might be had where a driver was incapacitated from controlling his team from any physical cause. Intoxication is punished as a crime in this state, and by the plaintiff's own showing the driver of his team voluntarily became drunk, and the drunkenness was the cause of the injury. We think the ruling of the district court was correct. AFFIRMED.

McVey v. Johnson.

75 165
112 516

75 165
133 551

1. **Justices' Courts: JURISDICTION: AMOUNT.** Where a petition in justice's court claimed that there was due plaintiff from defendant $124.83, but demanded judgment for only $99, the latter sum was the amount in controversy, and hence the court had jurisdiction of the amount.

2. **Appeal: CORRECTING VERDICT: ERROR NOT SHOWN.** Where it does not affirmatively appear that items withdrawn by plaintiff from his account during the trial were included in the verdict, this court cannot say that the court erred in refusing to deduct the amount of such items from the verdict found, even though the court neglected to instruct the jury as to the effect of their withdrawal.

Appeal from Keokuk District Court.—HON. J. K. JOHNSON, Judge.

FILED, SEPTEMBER 8, 1888.

THIS action was brought in justice's court. In the original notice plaintiff claimed ninety-nine dollars as debt and damages. On the day of trial he filed a petition, in which he claimed several items of damages for alleged breaches of a lease of real estate; also a number of items for work and labor. The aggregate of all the items was $124.83, but it was alleged that plaintiff remitted all of the claim except ninety-nine dollars. This *remittitur*, however, was general, and did not apply to any particular items. Plaintiff recovered judgment for ninety-nine dollars, and defendant took an appeal to the district court, where she filed a motion to dismiss the cause on the ground that the amount in controversy xceeded one hundred dollars, and the justice did not ave jurisdiction; but the motion was overruled. During he progress of the trial plaintiff withdrew two items of is account, which, in the aggregate, amounted to 7.83. The jury returned a verdict for plaintiff for irty-seven dollars. Defendant moved the court to

deduct the amount of the items which were withdrawn, from the amount of the verdict, but the motion was overruled, and judgment was entered for the amount of the verdict. Defendant appeals.

Mohland & Hamilton and *George D. Woodin*, for appellant.

Mackey & Stockman, for appellee.

REED, J.—I. The petition, it will be observed, alleged that the sum actually due plaintiff is in excess of one hundred dollars, but the amount sought to be recovered is less than that. The question of jurisdiction depends upon whether the amount in controversy is determined by the allegation as to the sum actually due, or that sought to be recovered. We think the latter amount determined the question. The amount claimed necessarily limits the amount of the recovery. If one sues in a court of competent jurisdiction to recover damages for the loss of a horse, alleging its value to be one hundred and fifty dollars, but claiming to recover damages only to the amount of one hundred and twenty-five dollars, he might recover that amount or any sum less than that, but could not recover more. The amount in controversy in that case would be the sum claimed, and the present case does not differ in principle from that. It is the amount in controversy, and not the items or matters out of which the claim arises, which confers or defeats jurisdiction, and that is to be determined by the sum which may be recovered in the action. The question, in effect, was decided in *Long v. Loughran*, 41 Iowa, 543.

1. JUSTICE'S COURTS: JURISDICTION: AMOUNT.

II. The question as to whether the amount of the items withdrawn by plaintiff during the trial in the district court should be deducted from the amount of the verdict was certified to this court by the trial judge. The certificate recites that the court did not instruct the jury as to the effect of such withdrawal. The question whether the deduction should be made depends entirely upon

2. APPEAL: CORRECTING VERDICT: ERROR NOT SHOWN.

whether the amount of the items was included in the verdict. But it does not appear that it was so included. It does not follow that they were included because the court neglected to instruct as to the effect of their withdrawal. There may have been no evidence to establish them, and consequently no necessity for instructing on the question. It does not affirmatively appear, then, that the court erred in refusing to make the deduction. In ordinary actions this court can reverse only for errors of law shown by the record.

AFFIRMED.

TALBORT V. NOBLE.

75	167
75	537
75	167
84	402
75	167
85	736
75	167
86	746
75	167
115	688

1. **Appeal: PRACTICE: AGREEMENT FOR SUBMISSION.** An agreement that appellee's abstract shall be set aside and the cause submitted on appellant's abstract is binding on the parties, and will be observed by this court, even though appellant's abstract fails to show that an appeal was taken, and the cause must therefore be dismissed.

2. ——: ——: ——: **CONSULTING TRANSCRIPT.** In such case, where the stipulation made no reference to a transcript, *held* that the submission must be on appellant's abstract alone, and that appellant's claim that the transcript showed that she had taken an appeal could not be considered for the purpose of preventing the dismissal of the cause, because this court will never consult the transcript where there is no dispute as to the correctness of the abstract.

Appeal from Decatur Circuit Court.

FILED, SEPTEMBER 8, 1888.

PLAINTIFF seeks to recover of defendant for an alleged breach of promise of marriage and for seduction. There appears to have been a trial to a jury, and a verdict and judgment for defendant. Plaintiff appeals.

Marion F. Slookey and *Bullock & Hoffman*, for appellant.

E. W. Curry and *Laughlin & Campbell*, for appellee.

ROBINSON, J.—This cause was first submitted in June, 1887. An opinion was filed at the next October term affirming the judgment of the court below, based upon the fact that an additional abstract filed by defendant showed that the evidence offered on the trial had not been made a part of the record, as required by law. After the opinion was filed, the plaintiff filed a petition for a rehearing, on the ground that, by agreement of parties, the additional abstract was to be deemed withdrawn, and the cause was to be submitted on the abstract filed by plaintiff. We found that a stipulation to that effect had been filed in this court, although it had not been called to our attention, and a rehearing was therefore granted. The cause was again submitted, and with it a motion of defendant for permission to withdraw the stipulation and objections thereto filed by plaintiff.

I. Defendant asks that the stipulation be withdrawn, and his additional abstract be considered, for the reason that the record filed by plaintiff at the time the stipulation was made did not confer jurisdiction on this court. It is true that the abstract filed by appellant did not show that an appeal had been taken; but that fact did not prevent the parties from making a valid agreement in regard to the submission of the cause in this court. Jurisdiction is conferred by the taking and perfecting of an appeal within the time and in the manner provided by law, and we determine whether we have jurisdiction of the case by an inspection of the record. This should disclose the facts in regard to the taking of the appeal, and unless it shows that one has been taken, we cannot do more than to dismiss the case. The stipulation in question was one the parties were authorized to make, and no facts are shown which would justify this court in setting it aside. The plaintiff insists that it shall be considered and treated as in full force, and we think she is entitled to have it so treated. The motion of defendant is therefore overruled.

1. APPEAL: practice: agreement for submission.

II. The plaintiff claims that the transcript shows that she took an appeal, and that the stipulation to submit the cause on her abstract was a waiver of the omission to state therein that an appeal had been taken. But the stipulation makes no reference to a transcript, and does not in terms nor in effect waive any defect in the abstract. The transcript is not consulted, as a rule, unless the parties disagree as to the record as set out in the abstract. It was therefore competent for the parties to agree that the cause should be submitted on the abstract of plaintiff, and, having so agreed, we must presume that the abstract is correct, and will not examine the transcript nor other showing as to the record. The amendment to the abstract filed by plaintiff after the stipulation was entered into must be disregarded. But we find that the abstract does not state that an appeal has been taken, nor show that a notice of appeal has been served. Therefore it is not shown that this court has jurisdiction of the cause, and it must be dismissed. *Plummer v. People's Nat. Bank*, 74 Iowa, 731; *Phillips v. Follett*, 69 Iowa, 39. If an appeal was in fact taken, we regret that plaintiff, by insisting on the stipulation, should have prevented a submission of the cause on its merits; but, having made the election, she must accept its results. DISMISSED.

2. —: —: —: consulting transcript.

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COOK & WHEELER v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

1. **Pleading:** AMENDMENT: CHANGE OF PRAYER. Where a plaintiff, upon certain facts stated in his petition, prays for relief to which such facts do not entitle him, he may properly be allowed to file an amended petition, setting up the same facts substantially, and praying for appropriate relief, and then to withdraw and dismiss his original petition.

2. **Appeal:** WHEN IT WILL NOT LIE: ORDER TO PRODUCE BOOKS. An appeal will not lie from an order to a defendant to produce his books in court to be used as evidence by plaintiff. Such order can be reviewed only on appeal after judgment. (Code, sec. 3164).

Appeal from Jasper District Court.—HON. D. RYAN, Judge.

FILED, SEPTEMBER 8, 1888.

IN their original petition plaintiffs alleged that they were buyers and shippers of cattle and hogs, and that from the second day of June, 1879, to the date of bringing the suit, which was August 19, 1885, they had shipped three hundred and fifteen cars of stock over defendant's railway to the Union Stock Yards at Chicago; that during all of that time defendant's published schedule of charges from all stations in Jasper county, that being the county from which the shipments were made, was fifty dollars per car, which amount was charged and paid by them on each car so shipped by them; that during the same time the defendant, under a secret agreement and arrangement with certain other shippers, who are named, granted to them a rebate of ten dollars per car upon their shipments of stock from said stations in Jasper county; and that shipments were made under like conditions and circumstances with those of plaintiffs; and the prayer was for the recovery of three times the amount of said overcharges and attorney's fee. On the twenty-first of February, 1887, they filed an amended and substituted petition, in which they alleged substantially the same facts, and prayed for the recovery of ten thousand dollars as damages on account of the overcharges. The cause, by agreement of parties, was then sent to a referee, who was empowered to settle the issues and try and hear the cause, and report the facts and conclusions of law. On the sixteenth of August following, plaintiffs filed a withdrawal and dismissal of all their pleadings and allegations except the amended and substituted petition filed February 21. Defendant then filed a motion to strike that pleading from the files, on the ground that it was in no sense an amendment to the original petition, but alleged a cause of action entirely distinct from that alleged in the former pleading. The referee overruled the motion, and defendant thereupon

filed an answer. Plaintiffs then filed a petition for an order requiring defendant to produce its books, showing its dealings with the other shippers named during the time in question, and the shipping bills, receipts, and other papers pertaining to those shipments. Defendant filed exceptions to the petition, but the referee overruled the same, and granted the rule prayed for in the petition. He then filed a report of his action in the premises, to which defendant filed exceptions. But the district court overruled the exceptions, and entered an order approving the report. Defendant appeals.

T. S. Wright and *Winslow & Varnum*, for appellant.

Alanson Clark, for appellees.

REED, J.—I. The first question argued by counsel relates to the order of the referee overruling the motion to strike the amended and substituted petition from the files, and the action of the court in approving that order. Their contention was that the case as made in the original petition was for the recovery of the penalty prescribed by section 13, chapter 77, Acts Seventeenth General Assembly, for violation of the provisions of that act, while that made by the amended and substituted petition was for the enforcement of the common-law right to recover the excessive charges which plaintiffs had been compelled to pay; the former being an action in tort, while the latter is based wholly on contract. It is certainly true that a party ought not to be permitted, by amendment of his pleadings, to substitute for the action stated therein one based on an entirely different right, and the statute regulating the matter of amendments confers no such privilege. But it is also true, we think, that when a party, by the averments of his petition, shows himself entitled to a particular remedy, but by his prayer demands relief in excess of that, or even entirely distinct from it, he may, by proper amendment, abandon that demand, and claim what under the law he is entitled to

1. PLEADING: amendment: change of prayer.

recover upon the facts pleaded. Such amendment would have the effect merely to adapt the prayer to the averments of the pleading, and the right to make it exists as certainly as does the right to amend a pleading by adding a prayer for the appropriate relief where a prayer for relief of any kind has been omitted, and its denial would be to revive the obsolete technicalities of the common-law system of pleading. It is important, therefore, to inquire as to what relief, if any, plaintiffs showed themselves entitled to by the averments of the original petition. It must be admitted that the prayer indicates that they were seeking to recover the statutory penalty. But their right of recovery is to be determined from the facts averred, rather than from the prayer of their pleading, and upon those facts they clearly are not entitled to that recovery. They allege that their shipments were interstate, and the statute, in so far as it is a regulation of commerce, can have no application to commerce of that character, the subject of its regulation being beyond the power of the state. *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. Rep. 4; *Carton v. Ill. Cent. Ry. Co.*, 59 Iowa, 148; *State v. Chicago & N. W. Ry. Co.*, 70 Iowa, 162. The fact allegations, as already stated, are substantially the same in both the original and amended petition. If, upon the facts alleged in the latter pleading, they are entitled to recover back the alleged overcharge, as to which no question was raised on this appeal, they were as certainly entitled to the same relief on the averments of the former. The only effect of the amendment, then, was to adapt the prayer to the fact allegations, and it was properly allowed.

II. We think an appeal will not lie from the order granting the rule to produce books and papers. The object of that petition was to obtain evidence in support of one of the material allegations of the petition. The subject of appeals from intermediate orders is governed by section 3164 of the Code. The only provisions which it is claimed give the right in this instance are those found in subdivisions 1 and 4, which are as follows: "(1) An

2. APPEAL: when it will not lie: order to produce books.

order made affecting a substantial right in an action where such order, in effect, determines the action and prevents a judgment from which an appeal might be taken." "(4) An intermediate order involving the merits and materially affecting the final judgment." It is manifest, we think, that neither of these provisions gives a right of appeal from an order of the character of that in question. The order, doubtless, affected a substantial right, but it neither determined the action nor prevented a final judgment from which an appeal might be taken. Neither did it involve the merits, or affect the final decision, within the meaning of the law. The evidence sought to be obtained may be sufficient to determine the rights involved in the action, but the order itself for its production no more affects the final decision than would an order sustaining or overruling a motion to suppress depositions. We think the ruling can be reviewed only on appeal after judgment. The appeal, so far as that order is concerned, will be dismissed, and the *supersedeas* discharged. The ruling overruling the motion to strike the amended and substituted petition from the files will be

AFFIRMED.

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CARRUTHERS & MURRAY v. MCMURRAY.

1. **Sale**: OF STOCK WITH GOOD-WILL: BREACH: EVIDENCE. Plaintiffs bought of defendant a stock of goods and the lease of the building in which the goods were kept, and they claim that defendant at the time, and as a part of the contract, agreed not to go into the same business in the same town for one year, and this action is to recover for an alleged breach of that agreement. Plaintiffs offered to prove that they would not have made the purchase but for such alleged agreement. *Held* that such evidence did not affect their right of recovery, and hence was properly excluded as immaterial.

2. **Instructions**: OMISSION CURED BY SPECIAL VERDICT. The omission of the court to submit to the jury a question which ought to have been submitted under the issues, is no ground for reversal on plaintiffs' appeal, when the jury, by special verdict, found against them as to the only fact on which they could claim the submission of the question.

3. **Contract**: PAROL AGREEMENT SUBSEQUENT TO WRITING: CONSIDERATION. A parol agreement made subsequent to the completion of a written contract concerning the same subject is not binding unless supported by some new consideration.

4. **Evidence**: EXCLUSION: ERROR CURED BY SPECIAL VERDICT. The exclusion of evidence relating solely to the measure of plaintiffs' damages for the breach of an alleged contract cannot be regarded as material, after the jury has specially found that the alleged contract never had an existence.

5. **Practice**: ARGUMENT TO JURY: NUMBER OF COUNSEL. Every party to an action tried to a jury is entitled to have every fact or point essential to his case called to the attention of the jury by his counsel in argument; and, guided by this principle, the court may, in its discretion, determine whether one or more counsel shall address the jury either in the opening or closing of the argument. Accordingly, where plaintiffs had two counsel, and one of them addressed the jury in the opening argument, and then stated that they would next be addressed by counsel for defendant, after which his associate would address them further on behalf of the plaintiffs, and the court then adjourned until the next morning, when defendant's counsel waived their right to address the jury, whereupon plaintiffs' counsel who was to have made the closing argument claimed the right to further address the jury, which claim was denied, *held* that this court could not say that in this the court abused its discretion; it not appearing that there was any failure by the counsel who addressed the jury to fully and fairly present every fact and point material to plaintiffs' case. (See opinion for statutes considered).

Appeal from Poweshiek District Court.—HON. D. RYAN, Judge

FILED, SEPTEMBER 8, 1888.

ACTION for the recovery of damages for the breach of an alleged contract for the sale of the good-will of a business. Verdict and judgment for defendant. Plaintiffs appeal.

Parsons & Perry, for appellants.

Scott & Clute, for appellee.

REED, J.—For many years prior to the fifth of July, 1883, the defendant had been engaged in business

as a general merchant at Brooklyn. He carried a large stock, and appears to have done an extensive business. On that day he sold his entire stock of goods to plaintiffs, and transferred to them the lease of the building in which the business had been carried on, and they thereafter conducted the same character of business at the same place. It is alleged in the petition that during the negotiations he represented and promised that he would not again engage in that kind of business at Brooklyn, and that he would not assist either of his sons in doing so, but that, in violation of that promise, he had advanced to one of his sons the sum of twenty-five hundred dollars to enable him to engage in the same business at Brooklyn, and that many of the customers who had patronized the store when defendant kept it, and who continued to patronize it after the sale to plaintiffs, had withdrawn their patronage, and had become patrons of the store kept by defendant's son. Defendant admitted the sale of the goods, but alleged that the contract was in writing, and denied that the sale included the good-will of the business, or that he had bound himself not to engage or assist his sons in engaging in the same business at Brooklyn. There is a decided conflict in the evidence given on the trial on the question as to whether there was a promise by defendant during the negotiations that he would not again engage in the business, or assist his sons in doing so. Both members of plaintiffs' firm testified positively that the defendant frequently made that promise while the negotiation was in progress, while defendant testified with equal positiveness that the subject was not mentioned until after the sale was fully completed, and that he then did no more than to assure them that it was his intention not to engage in the business, either at Brooklyn, or elsewhere, for one year. The jury were equired specially to determine the question, and their pecial verdict was to the effect that defendant did not ake the promise alleged during the negotiations. It as admitted by both parties that a written memondum was signed when the agreement was entered

into. The writing, however, had been lost, and could not be produced upon the trial. The parol evidence as to its contents tended to prove that it was a contract only for the sale of the goods and fixtures in the store.

I. On the trial plaintiffs offered to prove that they would not have made the purchase of the goods except for the agreement by defendant that he would not engage or assist his sons in engaging in the business in Brooklyn, but on defendant's objection the evidence was excluded. That ruling is assigned as error. We think it is correct. If a stipulation to that effect was a condition of the contract, as plaintiffs claim it was, they were entitled to recover for its breach, regardless of whether it was the moving or principal inducement for them to enter into the agreement or not. According to their claim, the "good-will" of the business was one of the subjects of the contract. They purchased and paid for it in the deal, and if they proved that averment they were as certainly entitled to recover as they would have been if there had been a failure to deliver any part of the tangible property which was the subject of the sale. It was immaterial, therefore, to inquire specially whether that condition was an inducement to the contract.

1. SALE: of stock with good-will: breach: evidence.

II. The district court instructed the jury that, if the parties treated the written memorandum as the evidence of their contract, its language, as shown by the parol evidence, would be the exclusive evidence of their agreement up to the time it was signed. It was not claimed that the instructions do not correctly state the general rule as to inadmissibility of parol evidence to vary the terms of a written instrument. But the contention was that if the contract, as entered into by the parties, related to two subjects, viz., the stock of goods and the good-will of the business, and the memorandum covered but one of these subjects, the rule would not be infringed by the admission of parol evidence of the contract as to the other. It is true that an

2. INSTRUCTIONS: omission cured by special verdict.

exception to the general rule arises when "the original contract was verbal and entire, and a part only of it was reduced to writing." 1 Greenl. Ev. sec. 284*a*. But in view of the special verdict, which determines that the original contract did not include the alleged condition, it cannot be material to inquire whether the case, if the allegation had been proven, would have fallen within the exception or been governed by the rule. With that finding the question is a mere abstraction, and very clearly plaintiffs sustained no prejudice from the failure of the court to submit it to the jury, even if it should be admitted that, as the case stood when it went to the jury, they were entitled to have it submitted.

III. The court also instructed that if defendant did not make the alleged promise pending the negotiations for the sale of the goods, but did make it after the sale was completed, and after the written memorandum was signed and delivered, it would not, unless supported by some new consideration, amount to a contract, and an action would not lie for the violation of it. The instruction is right. The promise, if made at that time, was not a mere modification of the written contract, but related to another subject, and, if binding, imposed new obligations and rights upon the parties. It was, in effect, a new and distinct agreement, and, to be binding as a contract, all the elements of a contract must have been included in it.

3. CONTRACT: parol agreement subsequent to writing: consideration.

IV. Defendant introduced sixty-four witnesses, who testified that prior to the sale to plaintiffs they had been patrons of the store, and that they continued to patronize it up to the time when defendant's son commenced business, when they transferred their patronage to him; and, being asked for the reason of such change, stated that it was because of their dissatisfaction with the manner in which plaintiffs conducted the business and kept their accounts. Counsel for plaintiffs proposed to cross-examine each of the witnesses

4. EVIDENCE: exclusion: error cured by special verdict.

fully as to the particular matters or transactions out of which he claimed his dissatisfaction arose, for the purpose, as he stated, of showing that he had no real ground of dissatisfaction. But the court, on defendant's objection, refused to permit that question to be gone into. In view of the special verdict, the question arising on this assignment is also a mere abstraction. The testimony of the witnesses related solely to the measure of plaintiffs' recovery in case they had succeeded in establishing a right of recovery. But the special verdict determines that they have no cause of action.

V. Two attorneys appeared for plaintiffs in the trial. After the evidence was concluded one of them addressed the jury. In closing his argument he stated to the jury that they would then be addressed by counsel for the defendant, after which his associate would address them further on behalf of plaintiffs. The court then adjourned until the next day. On the opening of the court the next morning the court directed that the argument of the cause proceed. Defendant's attorneys then stated to the court that they waived their right to address the jury. Up to that time plaintiffs' counsel had given no indication that they desired to argue the case further in the opening, but, immediately on the announcement by defendant's counsel of their election, the one who was to have made the closing argument claimed the right to further address the jury, conceding, however, to defendant's counsel the right to argue the case after him if they so desired. The court, however, ruled that he was not entitled to be heard further, and submitted the cause to the jury. The order of the trial is prescribed by statute. One provision is that "in the argument the party having the burden of the issue shall have the opening and closing, but shall disclose in the opening all the points relied on in the cause, and if in the close he should refer to any new material point or fact not relied upon in the opening, the adverse party shall have the right to reply thereto, which reply shall close the argument in the case." Code, sec. 2780.

5. PRACTICE: argument to jury: number of counsel.

Another is that "every plaintiff or defendant shall be entitled to appear by one attorney, and if there be but one plaintiff or defendant, he may appear by two." Sec. 2782. It will be observed that these sections contain no express provisions as to the number of counsel who may address the jury, either in the opening or closing of the argument. It was contended in argument, however, that the right conferred by section 2782, to appear by two counsel, necessarily implies the right to have the benefit of the learning and skill of each of them at every stage of the trial. But this claim manifestly is too broad. It is provided by another section (2779) that but one counsel on each side shall examine the same witness, and that upon interlocutory questions but one counsel on each side shall be heard, unless by permission or direction of the court. We think it was the intention of the legislature to leave the matter to the sound discretion of the court. The parties have the right to have the cause fully and fairly argued to the jury, and the court is prohibited from imposing any limitations upon counsel as to the time they may occupy in their argument to the jury. Sec. 2783. If for any reason one counsel is not able to fully present the cause in the opening, the right which plaintiff certainly has to have every fact or point essential to his case called to the attention of the jury at that time would imply, perhaps, the right to have the cause further presented by another attorney. And cases may often arise in which the fair administration of the law would demand that such privilege be extended to him. But after the argument has been fully and fairly opened, he cannot demand, as matter of right, that his counsel be further heard, except in reply to the argument for the adverse party. In the present case it does not appear that there was any failure by the counsel who addressed the jury to fully and fairly present every fact and point material to plaintiffs' case. The conduct and actions of plaintiffs, and the counsel who was to have closed the argument, indicated that they were fully satisfied with the effect he had made. Both they and the court regarded that the case had been fully argued. The refusal

of the court to permit the other counsel, under these circumstances, to further address the jury, was not a denial of a right they were entitled under the law to enjoy. Neither was it an abuse of the discretion with which the court is clothed. AFFIRMED.

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BRADLEY V. BROWN.

Tax Sale and Deed: NOTICE TO REDEEM: SERVICE ON TENANT. The requirement of section 894 of the Code, that a notice to redeem land from tax sale must be served upon the person in possession, in order to cut off the right to redeem, is peremptory; so that in this case, where the notice was personally served on the owner, the only person who had the right to redeem, *held* that it did not cut off that right, because it was not also served upon his tenant in possession. (See cases cited in opinion.) [REED, J., *dissenting.*]

Appeal from Wayne District Court.—HON. R. C. HENRY, Judge.

FILED, SEPTEMBER 8, 1888.

THIS is an action in equity, and involves the validity of a tax title to eighty acres of land. There was a decree for the plaintiff, and defendant appeals.

T. M. Stuart, for appellant.

H. Tannehill and *T. M. Fee*, for appellee.

ROTHROCK, J.—It appears that the plaintiff is the holder of the patent title to the land. The defendant claims title under a tax deed made in pursuance of a sale for taxes on the second day of October, 1882, for the delinquent taxes for the year 1881. At the time the notice of the expiration of redemption was served, one Cynthia Bills was in the actual possession of the land, and no notice was at any time served upon her. This is a conceded fact in the case, and as we think the rights of the parties depend upon this omission to give notice, no other question need be considered. It is provided by section 894 of the Code that "after the expiration of two years and nine months after the date of the sale of the land for taxes, the lawful holder of the certificate of purchase may cause to be served upon the person in

possession of such land or town lot, and also upon the person in whose name the same is taxed, * * * a notice * * * stating the date of sale, the description of the land or town lot sold, the name of the purchaser, and that the right of redemption will expire and a deed for said land be made unless redemption from such sale be made within ninety days from the completed service thereof." Said section further provides that "until ninety days after the service of said notice the right of redemption from such sale shall not expire." Counsel for defendant claims that the right of redemption did expire, notwithstanding the provisions of the statute, because notice was served upon the plaintiff, who was the owner and the person in whose name the land was taxed. It is urged that the object of the statute is to give notice to the owner that his land has been sold, and that when notice is given to him a notice to his tenant in possession of the land would be superfluous and unnecessary. We cannot concur in the views of counsel. It appears to us to be contrary to the spirit of all the decisions of this court with reference to the service of the expiration of redemption notice, and proof of such service, from the case of *Am. Missionary Ass'n v. Smith*, 59 Iowa, 704, to the present time. In *Hillyer v. Farneman*, 65 Iowa 227, where the land was by mistake taxed in a wrong name, and the notice was by publication, we held that the notice should have been directed to the person in whose name the land was taxed, and that if addressed to another, though that other be the real owner, the tax deed made in pursuance of such notice was invalid. The requirement of the statute appears to us to be absolute. It is one of the steps necessary to be taken to cut off the right of redemption, and courts have no power nor authority to dispense with the positive requirements of the statute upon the ground that they are unnecessary.

We think the district court correctly held that the plaintiff's right of redemption had not expired.

AFFIRMED.

REED, J., (*dissenting.*) The notice to redeem was served on plaintiff personally. He was the owner of the

property, and is the only person who was entitled to redeem from the sale, and the only one who had any interest to be protected by the redemption. Bills was in possession, it is true, but he had no interest in the property, and was under no obligation to redeem it. The holding of the majority is that plaintiff's right of redemption has not expired, for the reason that the notice was not also served upon Bills. That conclusion is reached by considering merely the language of the statute, while disregarding its spirit and purpose. But that is neither a safe nor a sound rule of construction. The legislature is presumed to have had some object in view when the statute was enacted, and to have enacted it with the view of effecting that object. The manifest purpose of the statute is to secure to the one entitled to redeem property which has been sold for taxes such notice of the sale, and the time when the right to redeem will expire, as will afford him an opportunity to exercise that right. The requirement that the notice shall be served on the one in possession, and on the one to whom the property is taxed, prescribes simply a mode of accomplishing that object. The proceeding is upon the theory that there is a presumption either that the persons served are entitled to redeem, or that by serving them the information contained in the notice will be communicated to the one who is entitled to redeem. To hold otherwise is to say that the statute requires the doing of a vain and useless thing; for of what possible avail is the mere service of the notice to redeem on one who has no interest which would entitle him to redeem and who would not be permitted to redeem if he were to make the attempt. When the one entitled to redeem is personally notified, then the purpose of the statute is accomplished. He may proceed to make the redemption within the time specified, and if he neglects to do so he ought not to be heard thereafter to question the deed on the ground that the notice was not also served upon some other person who had no interest in the property or right to make redemption.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY v. BECKET.

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County Treasurer: FUNDS TRANSFERRED BY PREDECESSOR: MANDAMUS TO PAY OVER. Action of *mandamus* to compel defendant, as county treasurer, to pay over to the plaintiff company certain taxes collected for its use by his predecessor in office, and by such predecessor transferred to the county fund by order of the board of supervisors. *Held* that such transfer was such an appropriation of the money as to release defendant from all liability to plaintiff on account of it, and that the action would not lie.

Appeal from Boone District Court.—HON. H. C. HENDERSON, Judge.

FILED, SEPTEMBER 8, 1888.

ACTION of *mandamus* to compel defendant, as treasurer of Boone county, to pay to plaintiff the sum of $455.89. It is shown that this sum of money was paid to the treasurer of Boone county on account of taxes levied to aid plaintiff in the construction of a railway. On the seventeenth day of April, 1884, the board of supervisors of that county ordered the treasurer who preceded defendant in office to transfer to the county fund three hundred and forty-one dollars of the money in his hands, which belonged to the plaintiff. The transfer was made as ordered, and the controversy in this case grows out of that action. The district court ordered the payment to plaintiff of the sum of $114.89, and found specially that defendant was not liable for the amount transferred to the county fund by his predecessor, on the ground that defendant could not be compelled to adjust it as between plaintiff and the county, and rendered judgment accordingly. The plaintiff appeals.

Albert E. Clarke, for appellant.

J. R. Whitaker, for appellee.

ROBINSON, J.—The proceedings of the board of supervisors of Boone county in regard to the transfer of the money in controversy were as follows: "It is hereby ordered that a transfer of three hundred and forty-one dollars be made of the Minneapolis & St. Louis railroad fund to the county fund, the same being to reimburse the county for expenses of an election and collecting tax." The transfer was made by the treasurer on the eighteenth day of April, 1884. Evidence was offered to show that the action of the board was taken pursuant to an arrangement made with plaintiff; but this was disregarded by the trial court, and we think it was immaterial to the issues in the case. No attempt was made to show what became of the money transferred to the county fund, nor was it shown that this defendant ever received any of it in any form. Appellant insists that the taxes paid to the treasurer of Boone county, for the benefit of plaintiff, constituted a trust fund, which could only be paid out in the manner authorized by law. Acts 16th Gen. Assem., sec. 4, ch. 123; *Stone v. Woodbury County*, 51 Iowa, 522; *Des Moines & M. Ry. Co. v. Lowry*, 51 Iowa, 487; *Butler v. Supervisors Fayette County*, 46 Iowa, 326. It may be conceded that the money in question was part of a trust fund, and that the action of the board of supervisors in ordering the transfer, and the action of the treasurer in making it, were wholly illegal, but that fact connot affect the defendant. He is responsible for the money due to plaintiff, which he actually received from his predecessor and from other sources, but he is not liable to plaintiff for anything more. Before plaintiff can obtain the desired order in this action he must show that the money he seeks to obtain is actually or presumptively in the hands of defendant. If in fact defendant is unable to pay over the money because he never received it, or for other sufficient reason, the relief asked by plaintiff will not be granted. *Rice v. Walker*, 44 Iowa, 461. It was held, in *Merrill v. Marshall County*, 74 Iowa, 24, that where a fund of the kind in question had been paid into the county fund, and expended on

account of the ordinary indebtedness of the county, the county would be liable. It seems to us that the transfer made by the predecessor of defendant on the order of the board of supervisors was such an appropriation of the money in question as to release defendant from all liability to plaintiff on account of it. The liability of defendant, if he had made the transfer ordered by the board, is not in question. We conclude that the judgment of the district court is correct. It is therefore

AFFIRMED.

DUNCOMBE V. POWERS.

1. **Assignment of Errors**: TOO GENERAL. Two of the twenty-nine grounds of the motion for a new trial in this case were: (1) "The verdict is contrary to law," and (2) "The verdict is contrary to the evidence." The only reference to the grounds of the motion made in the assignment of errors was as follows: "The court erred in not granting plaintiff's motion to set aside the verdict, arrest the judgment, and grant a new trial, for the reasons stated therein," and the question whether the verdict was sustained by the evidence was not otherwise presented. *Held* that the assignment was too general to raise that question on appeal.

2. **Instructions**: MATTER NOT IN ISSUE. The court is not required to instruct the jury as to a fact conceded by both parties, but on which neither claims anything.

3. ——: REVIEW: NO FOUNDATION FOR. An appellant cannot complain in this court of instructions given to which he did not except, nor of the neglect of the court to give a special instruction which he did not ask for.

4. **Highway**: DEDICATION AND PRESCRIPTION: EVIDENCE: INSTRUCTION. Where defendant claimed that the highway in question existed both by dedication and prescription, the court instructed that "knowledge in or notice to the owner of the use of the road as a public highway may be inferred from the use of the road by the public in such manner as that the owner, using his faculties as a reasonably prudent and observant person, having care for his property, would see or learn of such use." *Held* that this was not contrary to section 2031 of the Code, which provides that use of land shall not be evidence of adverse possession; because (1) the court did not state that such notice of use would be notice of an adverse claim; (2) other instructions given in the charge avoided any misunderstanding by the jury; and (3) the action was based upon an alleged dedication, as well as upon prescription, and said section relates to titles by prescription only

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94	198
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97	215
98	111
98	505
75	185
103	483
75	185
104	186
105	605
75	185
d109	483
75	185
111	533
75	185
113	345
113	691
75	185
117	307
117	415
75	185
118	559
75	185
f132	713
133	330

5. ——— : ——— : INSTRUCTION : EVIDENCE. An instruction as to the effect of the notorious and continued use of one's land for a highway, with knowledge on his part thereof, as bearing upon the title of the public therein, was objected to as not being warranted by the evidence; but *held* that the objection was not well taken. (See opinion for instruction and evidence).

6. **Instructions**: ASKED BY APPELLANT: OBJECTIONS ON APPEAL. One cannot on appeal be heard to object to instructions given at his own request.

7. ——— : FAILURE TO GIVE WHEN NOT ASKED. When the court fully and fairly presents the issues and directs the jury as to their duty, a party cannot on appeal be heard to complain that other instructions, not asked by him, were not given.

8. **Assignment of Errors**: RULINGS ON EVIDENCE: TOO GENERAL. The assignment of errors in the admission and exclusion of evidence in this case (for which see opinion) is *held* to be too general to present any question for review.

9. **Appeal**: ERRORS ASSIGNED BUT NOT ARGUED, AND VICE VERSA. Errors assigned but not argued, and those argued but not assigned, will not be considered by this court.

Appeal from Webster Circuit Court.—HON. D. D. MIRACLE, Judge.

FILED, SEPTEMBER 8, 1888.

PLAINTIFF is the owner of the south one-half of the northwest one-fourth of section 29, township 89, range 29, in Webster county, and seeks to recover of defendant for an alleged trespass upon it. The defendant, as supervisor of the road-district in which this land was situated, entered upon it, and removed the fences on the east and west boundary lines thereof at points where he claimed they obstructed a public highway. It is shown that the proper authorities of Webster county attempted to establish a highway on a line a short distance south of and nearly parallel to the one in dispute during the year 1863, but it was never traveled, and for the purposes of this case it may be conceded that it never had a legal existence. The evidence tends to show that the road in question had been used as a public highway for more than twenty years prior to the commencement of this action, and that during much of that time it was

the one chiefly traveled from Fort Dodge west. Until some three years prior to the time this case was tried, the land in question had been uninclosed prairie, and tracks led from the road in controversy in various directions. It is claimed by defendant that this road became a public highway by prescription and dedication, and whether it did or not was the real question in issue. The jury returned a verdict for defendant. Judgment was rendered thereon, and plaintiff appeals.

J. F. Duncombe, appellant, *pro se*.

A. E. Clarke, for appellee.

ROBINSON, J.—I. Appellant has devoted much of his argument to a consideration of the law applicable to the establishment of highways by dedication or prescription, and to the sufficiency of the evidence under the law to sustain the verdict. The law of the case, as given to the jury, was substantially as it is claimed to be by appellant. The sufficiency of the evidence we cannot determine, for the reason that that question is not properly before us. Two of the twenty-nine separate grounds of the motion for a new trial were that "(1) the verdict is contrary to the law," and that "(2) the verdict is contrary to the evidence." The only reference to the grounds of the motion made in the assignment of errors is in the following language: "The court erred in not granting plaintiff's motion to set aside the verdict, arrest the judgment and grant a new trial, for the reasons therein stated." This is too general to authorize us to determine whether the verdict is sustained by the evidence, and the question is not otherwise presented. *Hasner v. Patterson*, 70 Iowa, 681; *Leekins v. Nordyke & Marmon Co.*, 66 Iowa, 473.

1. ASSIGNMENT of errors: too general.

II. Appellant claims that the court erred in not charging the jury as to the abandonment of the highway which officers of Webster county had attempted to establish near the one in controversy. We cannot discover that there was

2. INSTRUCTIONS: matter not in issue.

any controversy in regard to that road. The defendant alleges in his answer that it was never worked nor traveled. The appellant states in his reply that it has been abandoned and fenced up for over fifteen years. No one based any claim upon that road. It was not material to any issue in the case, and there was no occasion for the court to speak of it specially in its charge. The charge given instructed the jury as to what facts were necessary to the establishment of a highway by dedication or prescription, and no prejudice could have resulted to plaintiff from the omission of a more particular reference to the abandoned highway.

III. Appellant insists that the court erred in charging the jury that the burden of proof was on plaintiff to establish his cause of action, and in failing to charge the jury that the burden of proof was upon defendant to establish the existence of the road in question by prescription. It is sufficient to say in regard to the part of the charge in question that no exception was taken to it. As to the alleged failure of the court to charge in regard to the burden of proof upon plaintiff, we would say that while the charge given did not in terms state that it was the duty of defendant to prove the establishment of the road in question, yet it did by necessary implication, and no benefit could have resulted to plaintiff by the use of more specific language. But plaintiff cannot complain of the omission, for the reason that he asked no instruction in regard to the burden of proof. *Smith v. Chicago, M. & St. P. Ry. Co.*, 60 Iowa, 514; *State v. Helvin*, 65 Iowa, 291.

8. ——: review: no foundation for.

IV. The tenth paragraph of the charge of the court was as follows: "Knowledge in or notice to the owner of the use of the road as a public highway may be inferred from the use of the road by the public in such a manner as that the owner, using his faculties as a reasonably prudent and observant person having care for his property, would see or learn of such use." Appellant insists that this paragraph is in conflict with the law, and cites

4. HIGHWAY: dedication and prescription: evidence: instruction.

Code, sec. 2031, and *State v. Kansas City, St. J. & C. B. Ry. Co.*, 45 Iowa, 139, in support of his views. It will be noticed that the effect of such knowledge is not stated in the charge. It is not said that knowledge of the use is notice that such use is under an adverse claim of right. The charge and instructions given must be considered together. In an instruction, given at the request of plaintiff, the jury were told in substance and effect that where the land affected by the alleged highway was wild and uninclosed, the notorious use of the highway would not charge the owner with notice, but that in such case his knowledge of the use, and his consent thereto, must be proven by other evidence. In *Onstott v. Murray*, 22 Iowa, 466, it was held that long-continued use of land might be evidence of a dedication. Section 2031 of the Code relates to titles claimed by prescription. In this case title was claimed both by dedication and prescription; and proof of use, in connection with other facts, is competent to prove title by dedication. *State v. Birmingham*, 74 Iowa, 407; *State v. Kansas City, St. J. & C. B. Ry. Co.*, 45 Iowa, 142. We conclude that the portion of the charge in question, considered with all the instructions given, was not erroneous.

V. Appellant complains of an instruction, given at the request of defendant, in the following words: "If plaintiff had knowledge that the line of road in controversy was used and notoriously traveled by the public as a highway over and across his land, the fact that he supposed the travel to be continued under the claim that it was a highway by establishment under statute, instead of by prescription, will not prevent the statute from running in favor of the road. If he knew of its use as a highway, he is bound at his peril to inform himself as to the nature of the right by virtue of which the right to travel over the land is claimed." The objection made is that there was no evidence that plaintiff "supposed the travel to be continued under the claim that it was a highway by establishment under the statute, instead of by prescription." But plaintiff testified that he never knew there

5 —: —: instruction: evidence.

was any claim by prescription; that he "supposed that the claim was by virtue of a line of road said to be run across the south line, from east to west," upon the land in question; and that he "always supposed that the claim made to this land was to what they claimed to be a laid-out road in the neighborhood of thirty rods south of the fence that has been testified to." In our opinion appellant is in error as to the evidence. The instruction is not vulnerable to the objection made.

VI. Appellant insists that the court erred in refusing to give certain instructions which he asked. His abstract of the record shows that all these instructions were in fact given. He also complains of the giving of an instruction on the ground that it was not applicable. But since the record shows that it was given at his request, he cannot now be heard to complain.

6. INSTRUCTIONS: asked by appellant: objections on appeal.

VII. Appellant claims that the court erred in neglecting to charge the jury as to certain evidence given, and its effect. Several of the errors assigned are of this character. We have not thought it necessary to consider them separately, for the reason that one rule applies to all. The court charged the jury quite fully in regard to its duties. All the issues were fairly submitted. If the plaintiff desired further instructions, he should have asked them. He asked but four instructions which were refused, and he has not discussed any of these in his argument.

7. ——: failure to give when not asked.

VIII. Appellant discusses at some length rulings of the court in submitting and excluding evidence. The assignment of errors in regard to such rulings is as follows: "(21) The court erred in several rulings made upon the evidence in this case, where evidence was offered by the plaintiff, as shown by the recorded evidence herein, and the rulings thereon, and the several exceptions thereto, to each of which rulings the plaintiff then and there excepted. (22) The court erred in admitting evidence on the part of the defendant, as shown by each of the various rulings of the court, against the several exceptions of plaintiff,

8. ASSIGNMENT of errors: rulings on evidence: too general.

as will fully appear by reference to the said evidence, exceptions, and rulings thereon, which evidence here referred to is hereto attached, as filed in this case by the reporter of this court, with the rulings and exceptions aforesaid." It is objected by appellee that these assignments are too general to present any questions for review. We think this objection is well taken. *Garrett v. Wells*, 63 Iowa, 257; *Wood v. Whitton*, 66 Iowa, 297; *Merchants' Union Barb Wire Co. v. Rice*, 70 Iowa, 15.

IX. Appellant has failed to notice in his argument quite a number of errors assigned, and must therefore be deemed to have abandoned them. Several of the questions discussed are not presented by the assignment of errors, and for that reason cannot be considered. Other questions discussed are practically decided by what we have already stated. It is only necessary to say, further, that we have carefully examined the record, but have found no prejudicial error of which appellant can be heard to complain. The judgment of the district court is therefore

9. APPEAL: errors assigned but not argued, and vice versa.

AFFIRMED.

ARQUETTE V. SUPERVISORS OF MARSHALL COUNTY.

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Criminal Law: BAIL: MONEY DEPOSITED IN LIEU OF: FORFEITURE: WHEN CONSUMMATED: RECOVERY FROM COUNTY. Plaintiff deposited money with the clerk of the district court as security for the appearance of another at the November term to answer to an *indictment*. At said term the accused failed to appear and was defaulted, and her security forfeited; but at the next January *term* said default and forfeiture were, upon a sufficient showing, set aside by the court. Before such setting aside, however, the clerk of the court, by order of the board of supervisors, had turned over the deposit to the county treasurer, who carried it to the credit of the temporary school fund. It appearing that there was money in said fund, not appropriated, equal to the amount of said deposit, plaintiff in this action sought by *mandamus* to compel the supervisors to order said sum refunded to her. Upon consideration of sections 4596–4600 of the Code, *held*—

(1) That the entry of default and forfeiture made at the November term did not, without more, authorize the county to appropriate the money.

(2) That the court was authorized to set aside the default and forfeiture at the next January term.

(3) That plaintiff was entitled to a writ of *mandamus* for an order to refund the money.

Appeal from Marshall District Court.—HON. J. L. STEVENS, Judge.

FILED, SEPTEMBER 8, 1888.

ACTION of *mandamus*. The petition of plaintiff alleges that on or about the twentieth day of September, 1886, she deposited with the clerk of the district court of Marshall county the sum of one hundred dollars as security for the appearance of one Minnie Cummings to answer to an indictment found against her at the then ensuing November term of said court; that at said term said Minnie Cummings failed to appear, and was defaulted and her security forfeited; that at the January, 1887, term of said court said default and forfeiture were, upon a sufficient showing, set aside by the court. The petition further states that prior to the setting aside of the default and forfeiture the clerk of said court, by direction of defendant, turned over the money deposited as aforesaid to the county treasurer, and it was carried to the credit of the school fund on account of fines and forfeitures; that on or about April 1, 1887, plaintiff filed in the office of the county auditor a petition praying that the money be refunded to her, which petition was refused by defendant. It is shown that there is sufficient money in the temporary school fund not appropriated to pay the claim of plaintiff. She asks that a writ of *mandamus* issue, commanding defendant to issue a warrant in her favor for the sum of one hundred dollars, payable out of any money in the hands of the county treasurer to the credit of the temporary school fund. The defendant demurred to the petition, and the demurrer was sustained. Plaintiff

electing not to plead further, judgment was rendered in favor of defendant for costs. The plaintiff appeals.

H. C. Henderson, for appellant.

W. W. Miller, for appellee.

ROBINSON, J.—The correctness of the decision of the district court in sustaining the demurrer is presented to us for review by means of various questions of law certified by the trial judge. Among these are the following: "(1) Was the order of default and forfeiture of the security or deposit money, at the November term, *1886*, of the district court, final and conclusive, not having been set aside or modified by the court at that *time*? (2) Did said order of forfeiture of itself, without further order of the court, operate to carry the deposited fund into the county treasury, for the use of the school fund? (3) Had the district court power, at the January term, 1887, to set aside the default and forfeiture entered at the November term, 1886? (4) Had the board of supervisors any authority or power to direct and require the clerk to pay said money security into the county treasury, and thereby place the fund out of the control of the district court, and deprive the plaintiff of the same, under and by virtue of the mere order entered for default and forfeiture by the district court?" The theory upon which the demurrer was sustained *seems to* be that the district court had no authority to set aside the default and forfeiture after the term at *which* they were entered; that its action at the January term following was void; that the right of the temporary school fund to the amount forfeited became vested and indefeasible when the November, 1886, term of court was adjourned. Appellee insists that such was the case, and cites sections 4596 and 4597 of the Code, in support of its claim. These sections are as follows: "Section 4596. If the defendant fail to appear for arraignment, trial or judgment, or at any other time when his personal appearance in court may be lawfully

required, or to surrender himself in execution of the judgment, the court must direct an entry of such failure to be made on the record, and the undertaking of his bail, or the money deposited instead of bail, as the case may be, is thereupon forfeited." "Section 4597. If, before the final adjournment of the court for the term, the defendant appear and satisfactorily excuse his failure, the court may direct an entry to be made on the record that the forfeiture of the undertaking or deposit be discharged." Sections 4598 and 4600 are as follows: "Section 4598. If the forfeiture is not discharged, the district attorney may, at any time after the adjournment of the court for the term, proceed by civil action only upon the undertaking of the bail." "Section 4600. If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, in its discretion remit the whole or any part of the sum specified in the undertaking." The primary object for which bail is taken in cases like that under consideration is to secure the personal attendance of the defendant when it is desired, and to avoid the necessity of keeping him in custody. Money may be deposited in lieu of bail, but it is received for the same purpose. It is true that it may be appropriated to pay the judgment in certain cases. Code, sec. 4592. It is supposed to be the property of the defendant, and since he is in court, he is bound by orders made in regard to it. But there is no more reason for refusing to discharge the forfeiture as to the money, where the default of the defendant is satisfactorily excused, than there would be for refusing to discharge the undertaking of bail, unless it is beyond the power of the court to discharge it. This is especially true when, as in this case, the money is not deposited by the defendant, but by another. The effect of the default entered under section 4596 of the Code was not to accomplish an immediate transfer of the amount forfeited to the school fund. Under section 4597, the court might at any time before its final adjournment for the term, upon the appearance of the defendant, and the due excuse of his default, discharge

the forfeiture. If the deposit of money had passed *beyond* the control of the court by virtue of the entry of default, the order of discharge as to that would be *without* effect. But that, evidently, was not the intent of the general assembly. Section 4598 authorizes the *district* (now county) attorney to proceed by civil action upon the undertaking of bail after the adjournment of court for the term, where the forfeiture is not discharged. A consideration of sections 4596–4598 leads to the conclusion that the entry of default did not of itself operate as a transfer of the money to the school fund; that the right to discharge the forfeiture upon the appearance of the defendant, and the satisfactory excuse of the default, was absolute in the court during the term at which the default was entered, and that no right of action in favor of the school fund became vested until *after* the adjournment of such term. But even then the right of recovery on the undertaking of bail is not *absolute*. Section 4600 gives a discretion to the court to remit the whole or any part of the amount of the undertaking before judgment, in case the defendant is taken into custody. These various provisions of the law are evidently designed to secure a hearing and disposition on its merits of the charge against the defendant, and the enforcement of any judgment which may be rendered against him. The giving of bail, and the depositing of money in lieu of bail, are auxiliary to the main case. This being true, it follows that the money so deposited should remain subject to the control of the court until the case is finally determined, unless it has been previously disposed of by order of the court, or by the defendant, in the manner authorized by law. In this case, as we have seen, the entry of default did not operate to transfer the money to the school fund, and no order for such transfer was made by the court. The demurrer admits that the default was set aside, and the forfeiture discharged, at the January, 1887, term, upon sufficient showing. The facts set out in the petition show that the case could not have been disposed of on its merits prior to the setting aside of the default, and that

the defendant must have appeared in order to have the default set aside and the forfeiture discharged. There is nothing in the sections of the Code quoted, and nothing in any other provisions of the law, to which our attention has been called, which forbids the discharge of the forfeiture alleged in this case, while it would be in harmony with the evident policy of the law to allow it. The district court should be held to have power to review and change its rulings and orders made during a criminal as well as during a civil cause, in the furtherance of justice. In this case we must presume that the court found, upon the showing made, that the entry of default and forfeiture was erroneous, or that the purpose of the case would be promoted by setting it aside. It follows, from what we have said, that, under the facts shown by the petition, the money in question was never legally transferred to the school fund, and that it should be refunded. The judgment of the district court is therefore REVERSED.

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CARTER v. MCFARLAND.

School District: TREASURER: ELECTION AT ADJOURNED MEETING: HOLDING OVER. The board of directors of a school district township met for the election of a treasurer on the third Monday of September, as required by section 1721 of the Code, and elected a person to that office, and then adjourned to the first day of October to give him an opportunity to accept or decline. At the meeting held pursuant to the adjournment he appeared and declined the office, and the board again adjourned to the fifteenth of October, when another ballot was had, resulting in a tie. The board again adjourned to the eighth of November, when plaintiff was elected treasurer. Prior to this, however, the defendant, who had been treasurer for the previous year, claiming that he had a right to hold over, filed his bond and oath of office with the president of the board, but the board refused to accept and approve it. In an action of *quo warranto* to oust the defendant, *held*—

(1) That, since the board entered upon the business of electing a treasurer on the day prescribed by statute, it might complete said business at any adjourned meeting,—the theory of the law being that an adjourned meeting is but a continuation of the regular one from which the adjournment was taken.

(2) That the refusal to accept by the person chosen at the regular meeting did not entitle defendant to hold over, because the meeting adjourned to a day fixed for the very purpose of learning whether he would accept or not, and his refusing at the adjourned meeting was the same in law as if he had been present and refused at the regular meeting; and thereupon the board had the right to proceed as if no ballot had been taken.

Appeal from Palo Alto District Court.—HON. GEORGE H. CARR, Judge.

FILED, SEPTEMBER 8, 1888.

THIS is an action in *quo warranto* to determine who is the treasurer of the school-district township of West Bend, in Palo Alto county. The plaintiff filed the petition, claiming that he was the duly-elected and qualified treasurer, and that the defendant was unlawfully usurping said office, and a judgment of ouster was prayed against the defendant. A demurrer to the petition was overruled, and the defendant appeals.

B. E. Kelly and *Clarke & Call*, for appellant.

Soper & Allen, for appellee.

ROTHROCK, J.—It appears from the averments of the petition that the defendant held the office in question for the year preceding the third Monday of September, 1887. It is provided by section 1721 of the Code that a treasurer shall be elected at the regular meeting of the board of directors on the third Monday of September. At the regular meeting in September, 1887, an election was had, and one David McFarland was duly elected, and the board adjourned until the first day of October, 1887, in order to give said McFarland an opportunity to accept or decline the office. The board met pursuant to adjournment, and said McFarland appeared and declined to accept the office. Thereupon the board adjourned until the fifteenth of October, 1887, at which time they met and proceeded to ballot for a treasurer. The ballot resulted in a tie, three votes being cast for the plaintiff,

and three for defendant. One of the members of the board was not in attendance at this adjourned meeting. Thereupon the board adjourned, without making an election, until the eighth day of November, 1887, in order that a full attendance of the board might be had. A meeting was held on the eighth day of November, pursuant to the adjournment, and the plaintiff was elected to said office. The plaintiff accepted the office, and his bond was afterwards accepted and approved by the board, and the defendant was, by a resolution of the board, ordered to turn over to the plaintiff all the books, papers and money in his hands belonging to said district; and, the business being concluded, the adjourned session of the regular September, 1887, meeting adjourned without date. At the regular meeting in September, 1887, the board fixed the treasurer's bond at three thousand dollars, and when David McFarland failed to qualify as treasurer, and after the failure to elect at the adjourned meeting on October 15, the defendant left with the president of the board a bond in the sum named with sufficient sureties, and with his oath of office indorsed thereon. The board refused to accept or approve said bond.

The defendant, by his demurrer, claims that the plaintiff was not legally elected as the successor of the defendant, and that defendant was therefore entitled to qualify anew, and hold the office for another year. It will be observed that the statute requires the treasurer to be elected at the regular meeting of the board on the third Monday in September. If the board had met and transacted the other business, and adjourned without day, and without giving attention to the election of a treasurer, the defendant would have held over, under section 784 of the Code. But attention was given to the election of a treasurer, and an adjournment was had in order to give the person elected an opportunity to accept or decline the office. This and all other adjournments were had for the purpose of selecting a treasurer for the ensuing year. It is not required that an election shall be held on the third Monday in September. Adjournments

of that meeting may be made, and any business required to be done at the regular meeting may be transacted at the adjourned meeting. "A regular meeting, unless special provision is made to the contrary, may adjourn to a future fixed day; and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is, indeed, but the continuation." 1 Dill. Mun. Corp. sec. 225.

But the defendant contends that as the board elected David McFarland, and he refused to accept, it was the right of the defendant to qualify anew, and hold over. The claim is made under the provisions of section 690 of the Code, which is as follows: "When it is ascertained that the incumbent hold over another term by reason of the non-election of a successor, or for the neglect or refusal of the successor to qualify, he shall qualify anew, within a time to be fixed by the officer who approves of the bonds of such officers." If the board was required to elect on a day certain, and did elect on that day, and the person elected afterwards refused to qualify, it may be that the board would have no right to hold a called or special meeting, and hold another election. But, as we have seen, the several adjournments were merely continuations of the regular meeting. They were just the same as adjourning from day to day until the business of the meeting should be completed. If David McFarland had been present when the election was had on the third Monday in September, and refused to accept the office, the board had the power to immediately proceed to elect another person, and, as the adjourned meetings were but a continuation of the regular meeting, the board could at any of the adjourned meetings lawfully do what it could have done on the third Monday in September. We think the ruling of the district court in overruling the demurrer was correct.

AFFIRMED.

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LEWIS V. LEWIS.

1. **Divorce:** DRUNKENNESS: CORROBORATION OF PLAINTIFF. In an action by a wife for a divorce on the ground of the habitual drunkenness of her husband, although there was no direct corroboration of her testimony to the effect that he acquired the habit after marriage, yet as the testimony of the other witnesses tended indirectly to establish that claim, *held* that this was sufficient corroboration, under section 2222 of the Code.

2. ———: DISMISSAL OF ACTION UPON AGREEMENT: BREACH: NEW ACTION: BAR: RESTORATION OF PROPERTY. After an action for divorce had been begun on the ground of habitual drunkenness, it was dismissed upon an agreement of defendant to convey to plaintiff certain property, and to abstain from the use of intoxicating liquors. The contract was reduced to writing, but the agreement to abstain was inadvertently omitted. The property was conveyed, but the promise to abstain was broken, and defendant again became habitually intoxicated. In a new action for divorce upon the same ground, *held* that parol was admissible to show the real conditions of the agreement on which the prior suit had been dismissed; and that that agreement, in view of the breach of the condition as to future sobriety, was no bar to another action; and that, upon granting a decree of divorce, equity would not order a reconveyance of the property conveyed under the agreement, especially as plaintiff did not ask any relief by way of permanent alimony.

Appeal from Webster District Court.—HON. D. D. MIRACLE, Judge.

FILED, SEPTEMBER 8, 1888.

THIS is an action for divorce. There was a decree in the court below dismissing the petition, and plaintiff appeals.

Albert E. Clarke, for appellant.

Cole, McVey & Clark, for appellee.

ROTHROCK, J.—I. The parties were married in the year 1871. There are five children, the issue of the

marriage; the oldest being now about sixteen years of age. In March, 1883, the plaintiff commenced an action for divorce upon the ground that the defendant, after the marriage, became addicted to habitual drunkenness. Soon after commencing the action the plaintiff separated from the defendant, and went with her children to the house of her father, in the state of Illinois, where she remained until the twenty-fifth of June, 1884. On the twenty-ninth of May, 1883, the plaintiff, at the urgent solicitation of the defendant, dismissed the suit. On the tenth day of September, 1883, the plaintiff commenced another action for divorce from the same cause. An answer was filed, and the suit was pending until June 24, 1884, when it was settled and dismissed, and the plaintiff returned to the house of the defendant, where she remained for about one year, when she commenced this suit, in which she alleged the same causes for divorce as were alleged in the two former actions. Issue was taken upon the petition, and the cause was tried upon its merits.

The evidence is clear, conclusive and satisfactory that the defendant was addicted to habitual drunkenness for about seven years prior to the commencement of the first suit, and that the habit increased and became more confirmed up to the time of the commencement of the present action, with the possible exception of a brief cessation previous to and for a short time after the commencement of the second suit. It is claimed by counsel for appellee, however, that there is no evidence corroborating the testimony of the plaintiff that the defendant acquired his habits of drunkenness after the marriage; and that, as it is provided by section 2222 of the Code, that "no divorce shall be granted on the testimony of the plaintiff alone," the decree dismissing the petition was right, upon the ground that the evidence was insufficient to sustain the action. In other words, it is claimed that the testimony of the plaintiff to the effect that the defendant became an habitual drunkard after the marriage is without corroboration, and that her testimony

1. DIVORCE: drunkenness: corroboration of plaintiff.

stands alone as to that fact. We concede that there is no direct evidence, aside from that of the plaintiff, upon this question. But all the facts in the case, as detailed by the other witnesses, tend to show that the habit did not become habitual until some years after the marriage. This is apparent from the fact that the fits of intoxication became much more frequent in later years than formerly, so that towards the last of the cohabitation the defendant was in almost a continuous state of intoxication.

II. The main ground of defense is founded upon the settlement and dismissal of the second action. At the time of the settlement a written instrument was prepared by plaintiff's counsel, and signed by the parties. It is in these words: "Said Ole Lewis conveys to Mrs. Annie Lewis, the plaintiff, the northeast quarter of section 17, township 90, range 28, and agrees to convey to her either one of the following pieces of property, to be selected by A. E. Clarke, and the deed to be delivered to him to hold for said Annie Lewis, viz.: East one-third of lot 2, block 11, Morrison and Duncombe's addition to the city of Fort Dodge; seventy-five and three-fourths feet off of the west side of east half of lot four (4) in block five (5) in Morrison and Duncombe's addition to Fort Dodge,—said land to be free from all lien and incumbrance. Said Ole Lewis shall pay a certain note made to John Nelson by said Annie Lewis for five hundred dollars for borrowed money, and shall pay all costs and attorney's fees of both parties to the suit. Said Annie Lewis shall dismiss the suit, and return to and live with said Ole Lewis as his wife, and all matters in controversy between the parties are hereby settled. Annie Lewis. Ole Lewis." As has been stated, the plaintiff did return and live with the defendant for about one year after this settlement, at the end of which time she commenced this suit. The defendant pleaded the settlement as a defense in the nature of a contract that the plaintiff, with full knowledge of the habits of her husband, for a good consideration, agreed that she

2. ——: dismissal of action upon agreement: breach: new action: bar: restoration of property.

would return to and live with him, and that she is thereby barred and estopped from maintaining this action. The plaintiff, by her reply, claims that said second suit was settled upon the express condition that the defendant should reform and quit drinking, and cease and refrain absolutely from the use of intoxicating liquors, and upon the condition that, if he should resume his drunken habits, the settlement should be held for naught, and his subsequent drunkenness should be a revival of all the plaintiff's preëxisting rights of action; and that, by inadvertence and oversight and mistake, said conditions were omitted from the written settlement, although it was the intent of all parties that such conditions should be included therein. It is not claimed by counsel for appellee that the settlement of the suit was a bar to another action because it was a condonation of the previous habitual drunkenness of the defendant. Condonation is nothing more than conditional forgiveness. Every condonation is upon the implied condition that the party forgiven will abstain from the commission of the like offense thereafter. *Johnson v. Johnson*, 4 Paige, 460; 14 Wend. 637; 1 Bish. Mar. & Div. sec. 371.

But it is contended that the plaintiff should be bound by her contract as it is expressed in the writing, and that, having upon a valuable consideration agreed to return and live with her drupken husband, she should abide by all the consequences resulting from such an alliance. But the evidence shows conclusively that the writing did not express all of the contract of settlement. The evidence is uncontradicted that the motive which induced the settlement was that the defendant should cease his habit of drunkenness. Hon. M. D. O'Connel was then the counsel for defendant. He was a witness on the trial of this case, and, among other things, testified as follows: "Mr. Lewis was emphatic in his promises in being strictly temperate in the future, at that meeting. Mr. Clark, Mr. Lewis, Mrs. Lewis, and myself were together in Mr. Clark's office. Mr. Lewis pledged himself to his wife that if she would dismiss

the divorce suit, and live with him, he never would drink any more liquor. Q. Was his promise to abstain from drink one of the conditions of the settlement? A. It was. She said she was afraid to make the settlement for fear he would not live up to his agreement; and Mr. Clark and myself then and there told her that we believed he would, and urged upon her to make such settlement, to which she then and there finally consented." This is corroborated by all the persons who were present at the settlement, and is not denied by the defendant in his testimony. The person who reduced the settlement to writing testified in relation to the omission of the said condition as follows: "The failure to include this condition in the writing was due entirely to my own oversight. * * * I sat down and wrote the paper; told Mrs. Lewis to sign it, which she did. The defendant then signed it. * * * I did not read the paper to Mrs. Lewis after I wrote it. I wrote it hastily, and the omission of the condition to which I have testified was purely owing to my own oversight and inadvertence." It is apparent that under this evidence the condition named should be regarded as a part of the settlement. If this were an action to reform this written instrument, we can scarcely conceive of a stronger case for reformation; and the same rule must obtain here. The condition that defendant would abstain from the habit of drunkenness should be regarded as part of the settlement. When so considered, there is no doubt of the right of the plaintiff to a decree. The evidence conclusively establishes the fact that a short time after the reconciliation the defendant's drunkenness became more frequent, and that for some time before this suit was commenced he was almost continuously intoxicated. It appears from the evidence that the defendant conveyed to plaintiff the quarter section of land described in the written agreement of settlement. Counsel for defendant claims that she cannot repudiate this settlement without conveying back the land to defendant. We do not regard this settlement as an ordinary contract. The conveyance of the land was by a husband to his wife in the nature of a settlement of

separate property upon her, and we do not think it essential that she should convey it back in order to give her standing in a court of equity in an action for a divorce. We do not understand that counsel for appellant claims anything in the way of alimony, and we think we ought not to disturb the title of the land.

III. The district court rendered a judgment against the defendant for the costs of the action, and for two hundred dollars attorney's fees. The defendant appeals from this judgment. As we hold that there should have been a decree for the plaintiff, the judgment for costs and attorney's fees will be affirmed. The plaintiff demands an allowance for additional costs, expenses, and attorney's fees in this court. In order to bring this unfortunate litigation to an end, we have concluded to make an additional allowance to the plaintiff in the sum of one hundred and fifty dollars. The decree of the district court will be reversed, and a decree of divorce will be entered in this court, and the care and custody of the children of the parties will be awarded to the plaintiff, and judgment will be entered against the defendant for the costs and for the two hundred dollars allowed by the district court and for one hundred and fifty dollars allowed by this court, or, at the option of plaintiff, the cause will be remanded for a decree in the district court in accord with this opinion.

GARDNER v. CONNELLY *et al.*

75 205
99 706

75 205
139 531

1. **Evidence**: PRACTICE: CONTRADICTION OF ONE'S OWN WITNESS. When a party makes his adversary his own witness, he may not offer evidence tending to assail his reputation for truth and veracity; but he may prove by another witness a different state of facts, and then ask the jury to determine which has told the most reasonable story. (Compare *Humble v. Shoemaker*, 70 Iowa, 223).

2. **Husband and Wife**: OWNERSHIP OF NOTE: EVIDENCE. A wife sought to foreclose a chattel mortgage securing a note. The defendant and intervening creditors of her husband claimed that the note belonged to the husband. Upon consideration of the evidence relating to the question as to whose money bought the note (see opinion), *held* that it was the property of the husband.

Appeal from Boone District Court.—Hon. J. L. Stevens, Judge.

Filed, September 8, 1888.

Action to foreclose a chattel mortgage. The defendant answered, and pleaded that the note and mortgage were not the property of the plaintiff, but belonged to F. W. Gardner, her husband; and pleaded a tender to the latter. Certain creditors of F. W. Gardner intervened, and pleaded that the plaintiff and her husband had conspired to defraud them, and asked that the note and mortgage be decreed to belong to F. W. Gardner, and for general relief. The court found for the defendants, and entered a judgment in accordance therewith. The plaintiff appeals.

Crooks & Jordan, for appellant.

Clayton Harrington and *E. L. Green*, for appellees.

Seevers, C. J.—The defendants called the plaintiff as a witness, and counsel for the appellant insist that the defendants cannot impeach or discredit their own witness. To a certain extent this is true. Such a witness cannot be impeached by the introduction of evidence tending to show that her reputation for truth and veracity is not good. Nor is a party bound hand and foot by the evidence of a witness introduced by him. He can show by another witness a different state of facts. *Humble v. Shoemaker*, 70 Iowa, 223. And while he is not permitted to say that either witness is not worthy of credit, he has the right to ask the jury to determine which has told the most reasonable story, and upon the whole evidence determine the matter in controversy.

1. Evidence: practice: contradiction of one's own witness.

The plaintiff testifies that she purchased the note of one Rathay with her own money; that is, she fur-

nished two hundred dollars and her father the residue. The note in fact was purchased by her husband; that is, he did the business. When the plaintiff was asked how she obtained the money, she stated that she taught *school* and gave music lessons after her marriage, and thus earned it. Her total earnings, with which she purchased several notes, were two hundred dollars. The notes so purchased amount to about one thousand dollars. Her husband transacted the business for her. He was employed on a salary, and the investments were made at different times. Without referring to the evidence at greater length, we feel satisfied that, taking the evidence of the plaintiff altogether, she has failed to establish that the note in controversy is her property; but, to the extent of the money she claims to have contributed in making the purchase, it belongs to her husband. This being in accord with the finding of the district court, the judgment must be

2. Husband and wife: ownership of note: evidence.

AFFIRMED.

MITCHELL V. KEPLER.

75 207
116 303

75 207
139 299
f140 30

Statute of Limitations: BREACH OF COVENANT OF SEIZIN AND OF RIGHT TO CONVEY. Covenants of seizin and of good right to convey are synonymous, and if at the time of conveyance the grantor does not own the land the covenant is broken immediately (*Brandt v. Foster*, 5 Iowa, 287-295), and a right of action at once accrues, and is barred by the statute after the lapse of ten years, under section 2529 of the Code.

Appeal from Chickasaw District Court.—HON. L. O. HATCH, Judge.

FILED, SEPTEMBER 10, 1888.

THE facts are stated in the opinion.

A. C. Boylan, for appellant.

J. R. Bane, for appellee.

SEEVERS, C. J.—In April, 1873, the defendant executed a deed conveying certain real estate, and this action is brought to recover on the covenants therein, which are as follows: That "we are lawfully seized in fee-simple of said premises; that they are free from incumbrances made by me, except taxes; that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the said premises and appurtenances thereto against the lawful claims of all persons whomsoever under or through me or us." The breach of these covenants is stated in the petition as follows: "That the covenants of defendant in said deed are not true; that neither the defendant nor Mary Kepler, his wife, was seized of said premises; that neither of them had good right or lawful authority to convey the same." This action was commenced in October, 1884, and the defendant pleaded that the plaintiff, or the person under whom he claims, never had entered into possession of said premises. It will be observed that the breach relied on in the petition is that the covenant of seizin and the right to convey the premises had been broken. The material question, therefore, is, when did this occur, and when did the cause of action accrue? It has been held by this court that the covenants of seizin "and good right to convey are synonymous, and if at the time of the conveyance the grantor does not own the land the covenant is broken immediately." *Brandt v. Foster*, 5 Iowa, 287-295. It necessarily follows that a right of action accrued when the covenant was broken, and as more than ten years had elapsed after the execution of the deed and before the commencement of this action, it follows that this action is barred by the statute of limitations. Code, sec. 2529. The judgment of the district court, therefore, is

AFFIRMED.

75	209
91	451
75	209
99	363
75	209
109	337
75	209
128	70
75	209
135	327
75	209
138	362

WYLAND V. FROST.

1. **Appeal:** PRACTICE: OBJECTION NOT RAISED BELOW. An objection not shown by the record to have been raised in the court below cannot be heard in this court.

2. **Judgment:** JURISDICTION: SERVICE OF NOTICE: EVIDENCE TO OVERCOME OFFICER'S RETURN. The return of an officer showing the service of an original notice, even though not regarded as conclusive, should be deemed strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof. And in this case, where the return was supported by the positive testimony of the officer who made it, but was denied by the parties served and others, all of whom testified from memory only, after the lapse of three years, but their testimony was contradicted as to incidental facts, while that of the officer was corroborated by evidence that the notice was handed to him for service on the morning of the day when he claimed to have served the same, *held* that the evidence was insufficient to set aside a judgment rendered on the return.

Appeal from Shelby District Court. — HON. A. B. THORNELL, Judge.

FILED, SEPTEMBER 10, 1888.

THIS is an action in equity by which the plaintiff seeks to set aside a judgment at law against her on the ground that the justice of the peace who rendered the judgment had no jurisdiction of the plaintiff, because she was not at any time served with an original notice of the action. There was a decree dismissing the plaintiff's petition, and she appeals.

Smith & Cullison, for appellant.

Macy & Gammon, for appellee.

ROTHROCK, J.—The record of the action upon which the judgment was rendered is complete and in due form.

It is true that counsel for appellant claim that the judgment is void because it was entered by default, and that no appearance was made for the plaintiff for more than an hour after the time named in the notice. This objection cannot be considered, because no such claim is made in the petition; and for aught that appears the first allusion to it is made in argument in this court.

The issue which was tried in the court below was that the return of the constable who served the original notice was false. The plaintiff sought to establish this fact by the testimony of herself and some four other witnesses. The return shows that the notice was personally served on the plaintiff and her husband on the twenty-sixth day of July, 1882, at Harlan, in Shelby county. The plaintiff and her husband and others testify that neither the plaintiff nor her husband was at Harlan on that day. None of these witnesses produced any record, memorandum or circumstances tending to verify or support their testimony. Their statements are founded upon mere recollection, and this suit was not commenced until about three years and a half after the judgment was rendered. On the other hand, we have the return of the constable who made the service, and his testimony, in which he states positively that he made the service at the house of plaintiff and her husband, at Harlan, on the day named in the return. He is corroborated by evidence that the notice was actually delivered to him for service on the morning of that day, and the plaintiff and her husband are contradicted in reference to incidental facts which tend to show that the claimed absence on the day of service was a mistake. A careful examination of the whole evidence in the case leads us to the conclusion that the district court correctly found that the evidence introduced by the plaintiff is not of that clear, conclusive and satisfactory character required to overthrow the return of the officer. It has been held in some jurisdictions that the only remedy for a false return of service is an action upon the bond of the officer claiming to have made the service. *Slayton v. Chester*, 4 Mass.

478; *Bott v. Burnell*, 9 Mass. 96; *Messer v. Bailey*, 31 N. H. 9; *White River Bank v. Downer*, 29 Vt. 332. But conceding the rule to be otherwise, for the purposes of this case, we think that the evidence of the plaintiff falls far short of establishing the falsity of the *return*. Upon grounds of public policy, the return of the officer, even though not regarded as conclusive, *should* be deemed strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof. *Jensen v. Crevier*, 33 Minn. 372; *Starkweather v. Morgan*, 15 Kan. 274; Wade, Notice, sec. 1380.

AFFIRMED.

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f 109 407

POTTER V. POTTER.

Divorce: CRUELTY: EVIDENCE: CORROBORATION. Action for divorce on the ground of cruel and inhuman treatment. The evidence discloses mutual violence between the parties, and much vile and abusive language applied by each to the other, but fails to show which of the parties was the aggressor, and plaintiff is not corroborated as to the matter constituting the alleged cause of action. *Held* that the evidence did not justify a decree of divorce.

Appeal from Johnson District Court.—HON. H. S. FAIRALL, Judge.

FILED, SEPTEMBER 10, 1888.

ACTION for divorce on the ground of cruel and inhuman treatment endangering the life of plaintiff. The district court entered judgment in accordance with the prayer of the petition. Defendant appeals.

Milton Remley, for appellant.

G. A. Ewing, for appellee.

REED, J.—The petition charges that on two occasions defendant was guilty of acts of great personal violence towards plaintiff, and that on many occasions he used vile, opprobrious and insulting language towards her. Plaintiff testified to the acts of violence alleged; also that on many occasions he had called her a "bitch," a "damned old bitch," a "damned whore," and other opprobrious names. Defendant, in his testimony, admitted that he laid his hands on her person and pushed her on the two occasions when the violence is alleged to have been committed, but denied that he did so in anger, or that any injury was done to her. He also admitted that he had on different occasions called her a "bitch," and a "damned bitch," but denied that he had ever applied to her the other epithets alleged. But he claimed that when he used the offensive language towards her he was provoked thereto by her vile language toward him, in which she called him a "son of a bitch," and other similar names; and she admitted having applied that epithet to him, but claimed that she did so in retaliation. She also admitted that on one of the occasions when she claims to have suffered violence she struck him with a broom with sufficient force to break the handle; also that on one of the occasions she threw his hat out of the house, and on the other knocked his pipe out of his mouth, and that these acts of hers constituted the *casus belli*. Two other witnesses testified that they heard the disturbance on one occasion, but they saw no part of it, and did not know which party was the aggressor, or what was done by either of them. Another witness, a daughter of plaintiff, and friendly to her, testified that she witnessed more than one quarrel between them, and that on such occasions the epithets "bitch," "damned bitch," and "son of a bitch" were used; but she left it in doubt as to which of the parties first used the offensive language. We think plaintiff failed to make a case entitling her to a divorce. If her testimony could be accepted as true in all respects, and could be acted upon,

it would barely justify the court in dissolving the relation. But the statute (Code, section 2222) provides that "no divorce shall be granted on the testimony of the plaintiff alone." Under that provision, before she is entitled to relief, she must be corroborated, and the corroboration must be as to the matters constituting the alleged cause of action. The only witness whose testimony tends to corroborate her is that of her daughter; and the facts established by the testimony of the corroborating witness, in connection with that of plaintiff, do not entitle her to a divorce. Defendant's language, it must be admitted, was vulgar and brutal. But a woman with the spirit and disposition to apply to her husband—even in retaliation—the epithets which by her own confession plaintiff was accustomed to apply to defendant, is not likely to suffer greatly either in body or mind from the application to her of the language used by defendant. We think the judgment should be

REVERSED.

COCHRANE *et al.* v. BRECKENRIDGE.

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92 387
75 213
98 514

1. **Evidence**: PERSONAL TRANSACTION WITH ONE DECEASED. In an action by the personal representatives of a decedent involving the title to land, the testimony of defendant and his wife, that by an oral contract with the deceased the defendant purchased and paid for the land in question, was incompetent, under section 3639 of the Code; and the fact that one of the plaintiffs testified to searching among the papers of decedent for a certain conveyance did not open the door for such incompetent testimony.

2. **Appeal**: PRACTICE: TRIAL DE NOVO: OBJECTION TO EVIDENCE. When a case is triable *de novo* in this court, an objection to the competency of evidence, which was made below, may be renewed, even though no exception was taken to its admission below.

Appeal from Audubon District Court.—HON H. E. DEEMER, Judge.

FILED, SEPTEMBER 10, 1888.

THIS action was commenced by Robert Cochrane in his lifetime to restrain the defendant from trespassing on certain real estate which belonged to the deceased, as he claimed, and asking such other relief as he was equitably entitled to. The defendant denied the material allegations of the petition, and pleaded that he was the owner of the equitable title to the real estate, and asked that the plaintiff be compelled to convey the same to him, that his title be quieted, and for general relief. Prior to the hearing in the district court, Robert Cochrane departed this life, and the plaintiffs, his legal representatives, were substituted as plaintiffs. A temporary injunction was granted, and the court found that the real estate belonged to the plaintiffs, and entered a decree quieting the title in them, and the injunction was made perpetual. The defendant appeals.

Theo. F. Myers and *J. M. Griggs*, for appellant.

H. F. Andrews, for appellees.

SEEVERS, C. J.—The defendant claims that during the lifetime of Robert Cochrane he entered into an oral contract with the deceased, whereby he purchased and paid for the real estate in controversy, and under such contract he entered into possession thereof. The defendant and his wife were introduced as witnesses in the defendant's behalf. It was objected that they were incompetent and could not testify as to any personal transactions between the deceased and the defendant. The evidence was admitted, and said witnesses gave evidence tending to show a purchase by defendant and payment for the real estate. This was a personal transaction with the deceased, and the evidence was clearly incompetent. Code, sec. 3639.

It is said that we cannot consider the competency of the witness, because there was no exception taken to the ruling of the court in admitting the evidence. As this is an action in equity, no exception was necessary. The objection made below can be renewed here for the reason that the trial is *de novo*.

It is said that the witnesses were competent, because one of the plaintiffs was introduced as a witness in their behalf. Such witness testified only to searching among the papers of the deceased for a certain conveyance. This did not have the effect to make the defendant and his wife competent to testify to personal transactions with the deceased; and as their evidence must be rejected, the defendant has utterly failed to establish the defense pleaded by him, and therefore the decree of the district court must be AFFIRMED.

THE STATE v. STONE.

1. **Criminal Law**: OBTAINING PROPERTY ON FALSE PRETENSES: FORMER ACQUITTAL. A trial resulting in an acquittal upon an indictment for uttering and publishing as true a certain false and forged note and chattel mortgage, is a bar to a subsequent prosecution on an indictment for obtaining property, in exchange for said note and mortgage, upon false pretenses, where the transaction relied on in both indictments is the same.

2. **Instructions**: NOT WARRANTED BY THE EVIDENCE. An instruction as to the legal effect of a fact of which there is no evidence is erroneous.

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127 304
127 305
75 215
143 588

Appeal from Cass District Court.—HON. A. B. THORNELL, Judge.

FILED, SEPTEMBER 10, 1888.

THE defendant was indicted, tried and convicted for obtaining property by false pretenses, and he appeals.

Rockafellow & Scott, for appellant.

A. J. Baker, Attorney General, for the State.

ROTHROCK, J.—The defendant pleaded not guilty, and also a former acquittal of the offense charged in the indictment. The false pretenses set out in the indictment were, that the defendant falsely represented to one Thompson that he was the owner of a note and a chattel

1 CRIMINAL law: obtaining property on false pretenses: former acquittal.

mortgage upon certain cattle, executed by one Burdett, and that Burdett resided in Cass county, and that the mortgaged property was in said county; that said representations were made to one Thompson, and that he was induced thereby to exchange a spring-wagon for said note and mortgage, which it is alleged are false and forged instruments. It appears that at a previous term of the court the defendant was tried and found not guilty upon an indictment charging him with uttering and publishing as true a certain false and forged note and chattel mortgage. The note and mortgage are the same in both indictments. In the former indictment the defendant was charged with uttering and publishing them as genuine, and in the indictment in this case he was charged with representing them to Thompson as genuine, and the uttering and publishing and the false pretenses involve the identical trade or transaction with Thompson. The court instructed the jury that if the transactions were identical, the defendant could not be convicted upon the alleged representation that the note and mortgage were the genuine and valid obligations of Burdett. But the court further instructed the jury that if the representations that Burdett resided in Cass county, and that the mortgaged property was in said county, were made by the defendant, and were known by him to be false, and that by means thereof he obtained the wagon from Thompson, he was guilty. We do not think this instruction was warranted from any evidence in the case. It is to be observed that the court practically took from the jury the alleged representations as to the genuineness of the note and mortgage. If this was not done in terms, it ought to have been done, because the evidence is uncontradicted that the two indictments were founded upon the same transaction. There is no evidence in the case by which the jury could fairly find that Thompson was induced to part with his wagon by reason of the representation that Burdett resided in Cass county, and that the mortgaged property was in said county. Indeed, it was not so much a question with

2. Instructions: not warranted by the evidence.

Thompson where the mortgaged property was, and where the mortgagor resided, as it was whether the note and mortgage were genuine instruments. Other questions are made by counsel which we need not determine. The judgment will be reversed because the verdict is not supported by the evidence.

REVERSED.

HENDERSON v. MCMAHILL *et al.*

Estoppel: OF GARNISHEE TO DENY INDEBTEDNESS: REPRESENTATIONS LEADING TO SUIT. A garnishee in an attachment suit induced the plaintiff to begin the action and to garnish him, by representing that he was indebted to defendant in the action, thus leading the plaintiff to incur trouble and expense which would be lost unless recovered through the garnishee. *Held* that the garnishee was not thereby estopped to deny his indebtedness to defendant,—his liability to plaintiff being, at most, the actual expenses incurred by the latter in reliance upon the representations.

Appeal from Page District Court.—HON. A. B. THORNELL, Judge.

FILED, SEPTEMBER 10, 1888.

THE facts are stated in the opinion.

W. P. Ferguson and *Benj. Todd*, for appellants.

C. S. Keenan, for appellee.

SEEVERS, C. J.—The plaintiff commenced this action against the defendant, and caused the defendant Prestman to be attached as garnishee. The latter appeared, and denied being indebted to defendant. The plaintiff controverted the answer of the garnishee, and pleaded that he was estopped from denying that he was indebted to defendant, on the ground that plaintiff commenced this action on the faith of the representations made by the garnishee. There was a demurrer to such pleading, which was sustained, and, as the amount in controversy was less than one hundred dollars, we are required to determine the following questions certified

by the trial judge: "A party, for the sole purpose of inducing the plaintiff to sue out an attachment against the defendant, and have himself garnished as debtor of defendant, represented to plaintiff that he held funds of defendant liable to garnishment, which plaintiff might secure by such process. The plaintiff, relying solely on such representations, made at and prior to the service of the garnishment, commences and prosecutes suit by attachment against defendant, which is served by garnishment of garnishee, thereby incurring expense and trouble, which will be lost if garnishee is permitted to deny the truth of such representations. The question is, do such facts estop the garnishee from afterwards denying indebtedness or liability to defendant? If yes, this cause should be reversed. If no, then affirmed." The plaintiff's debt against defendant still exists. It is true, he incurred costs, and was put to trouble, but we are not asked whether he can recover such costs, but whether the garnishee can deny the indebtedness. We think he can, if such is the truth. He is at most only liable to the extent the plaintiff has suffered loss in reliance on the representations, and this is the extent of the estoppel. *Lewis v. Prenatt*, 24 Ind. 98. The question propounded must be answered in the negative, and the judgment of the district court AFFIRMED.

75	218
132	391
75	218
139	422

WHITE V. WHITE.

Divorce: ALIMONY: SUBSEQUENT ALLOWANCE FOR SUPPORT OF CHILD. Plaintiff, in a prior action, procured a divorce from defendant and the custody of their child, and five hundred and twenty-five dollars alimony. Prior to the decree the parties agreed that, in case a divorce was granted, plaintiff should have the child, and five hundred and twenty-five dollars in full of her share of the property, and that she should care for, support and educate the child. *Held* that she could not maintain a subsequent suit for additional money for the support of the child; not, at least, without showing a change in the circumstances of the parties. (*Reid v. Reid*, 74 Iowa, 681, *followed*).

Appeal from Marshall District Court.—Hon. D. D. Miracle, Judge.

Filed, September 10, 1888.

The plaintiff and the defendant were formerly husband and wife. They were divorced upon the complaint of the plaintiff, in April, 1886. There was one child, the issue of the marriage, the custody of which was awarded to the plaintiff, and she was allowed alimony in the sum of five hundred and twenty-five dollars, which has been fully paid. She commenced this action in August, 1887, in which she asks that the defendant be decreed to pay a sum at stated periods for the support of the child. There was a demurrer to the petition, which was overruled. The defendant answered, and a demurrer to the answer was overruled. Plaintiff appeals.

O. L. Binford and *J. H. Bradley*, for appellant.

Caswell & Meeker, for appellee.

Rothrock, J.—It is not claimed that there has been any change in the circumstances of the parties which would authorize a modification of the decree so far as it pertains to alimony or to the support of the child. It is averred in the answer that there has been no such change. Besides, it appears from the answer that, before the decree of divorce was entered, the parties in good faith entered into an agreement in writing by which it was stipulated that in case a divorce should be granted the plaintiff should have the custody of the child, and care for and support and educate it, and the defendant should pay the plaintiff five hundred and twenty-five dollars in full of her share of their property. The case of *Reid v. Reid*, 74 Iowa, 681, is decisive of the case at bar. The court correctly held that the plaintiff was not entitled to the relief asked.

Affirmed.

FULLER v. MCDONNELL *et al.*

1. **Intoxicating Liquors:** NUISANCE: INJUNCTION: CITIZENSHIP OF PLAINTIFF. A Methodist clergyman, who resides in a county in this state for the purpose of preaching there for one year under appointment of the bishop of his church, but subject to removal at any time by order of the bishop, is a citizen of the county within the meaning of the statute authorizing any citizen of the county to maintain an action for the abatement of a liquor nuisance.

2. **Citizenship:** WHO IS CITIZEN. Any male person over twenty-one years of age, who has his present home and domicile in any county, although it may be for a temporary purpose, is a citizen of that county, provided he has a fixed intention of remaining there for an indefinite period of time, and has no home, domicile or right of citizenship elsewhere.

Appeal from Palo Alto District Court.—HON. GEORGE H. CARR, Judge.

FILED, SEPTEMBER 10, 1888.

ACTION to restrain a nuisance caused by the selling and keeping for sale intoxicating liquors. Judgment for the plaintiff, and the defendants appeal.

P. O. Cassidy, for appellants.

John Jenswold, for appellee.

SEEVERS, C. J.—The petition states that the plaintiff is a citizen of Palo Alto county, and whether this has been established by the evidence is the first proposition discussed by counsel for appellants. The plaintiff is a Methodist clergyman, and a native of the state of Massachusetts, and testifies as follows: "My object in coming to Palo Alto county was to preach the gospel under the auspices of the Methodist Episcopal Society. I was transferred here through the bishop. He sent me to Emmetsburgh. The bishop disposes of the work of

the clergymen under him. When I came to Palo Alto county it was my intention to live here permanently within the limitations of my church as long as the bishop directed me to; in other words, the bishop has absolute power to change at his will. When I came to *Palo* Alto county it was my intention to remain here until properly removed by the authorities under which *I* was working; and if the authorities would to-day issue an order to me to remove to some other place, I would do it. My appointment in Emmetsburgh is only for one year." It is provided by statute that "any citizen of the county" may maintain an action to enjoin a nuisance of the character referred to in the petition. Counsel for appellants insists that a citizen must be a voter, but this does not follow; and therefore we decline to determine such question. Any male person over twenty-one years of age is a citizen, who has his present home and domicile in any county, although it may be for a temporary *purpose*, provided he has a fixed intention of remaining there for an indefinite period of time, and has no home, *domicile*, or right of citizenship elsewhere; and such we understand to be the position of the plaintiff.

Counsel for appellants also insist that there is no sufficient evidence to warrant the judgment of the court as to one of the defendants, but we think otherwise. It is not our custom to set out the evidence, and we deem it sufficient to say that it fully sustains the judgment.

AFFIRMED.

THE FIRST NATIONAL BANK OF NEVADA v. FENN, Defendant, and RINGHEIM *et al.*, Intervenors.

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Appeal: EVIDENCE TO SUPPORT VERDICT. There being evidence tending to show that a note and mortgage given by a husband to his wife was founded upon a valid consideration, and was not designed to defraud creditors, *held* that a verdict to that effect could not be disturbed by this court.

2. **Interest:** ORAL AGREEMENT FOR TEN PER CENT.: VALIDITY AFTER EXECUTION. Section 2077 of the Code, providing that the rate of interest shall be six per cent., unless the parties in writing agree to a higher rate, does not prohibit an oral agreement for ten per cent.; and where there is such an oral agreement, and the amount of such interest is afterwards ascertained and a promissory note given therefor, it is binding upon the parties, and the creditors of the maker of the note cannot interfere.

3. **Instructions:** IMMATERIAL VARIANCE FROM ISSUES. The issue being whether the mortgage in question was given and received for the purpose of "hindering, delaying or *defrauding*" creditors, the court submitted to the jury the question whether it was made and received for the purpose of "hindering, delaying and *defeating*" creditors. *Held*, in view of the evidence and the charge of the court, that the variance was immaterial and without prejudice.

4. **Husband and Wife:** HUSBAND USING WIFE'S MONEY: FAILURE OF WIFE TO RECORD CLAIM UNDER REVISION: CREDITORS AFTER REPEAL. Where a wife let her husband have the use of her money while section 2500 of the Revision of 1860 was in force, but failed to record notice of her ownership of the same as required by said section, creditors of the husband, who became such after the repeal thereof, could not object to a mortgage given by him to his wife after such repeal, to secure the money and interest. (*Jones v. Brandt*, 59 Iowa, 332, *followed*).

Appeal from Story District Court.—HON. S. M. WEAVER, Judge.

FILED, SEPTEMBER 10, 1888.

ACTION on a promissory note executed by the defendant. An attachment was issued, and certain personal property attached. Thereupon the intervenors filed petitions claiming the property under chattel mortgages. The plaintiff pleaded that the mortgages were fraudulent, because they were given for the purpose of hindering and defrauding creditors of the defendant. Trial by jury, verdict for the intervenors, and judgment. The plaintiff appeals.

Dyer & Fitchpatrick, for appellant.

D. J. Vinje, for appellees.

SEEVERS, C. J.—I. The defendant, being indebted to the plaintiff, executed in August, 1884, a mortgage on the property in controversy to J. B. Fenn, his wife, to secure an alleged indebtedness, which mortgage she assigned to the intervenor Ringheim, and under it he claims. The indebtedness so secured was created about twenty years prior to the execution of the mortgage, and no note or written promise to pay the same was executed, until a note was given therefor at the time the mortgage was executed. But there was evidence tending to show that the defendant *orally* agreed to pay his wife the amount of money she placed in his hands or loaned him, with ten per cent. interest. The plaintiff insists that the verdict is not sustained by the evidence, which it is claimed clearly shows that the note and mortgage were given to hinder, delay and defraud the creditors of the defendant. The evidence shows that Mrs. Fenn did let her husband have about eight hundred dollars. Counsel do not dispute this proposition. The evidence tends to show that such money was never repaid. This being so, it follows that the defendant was indebted to his wife, unless it can be said that she gave her husband the money with no expectation on her or his part that it should be repaid. Conceding for the present that the instructions given the jury are correct, we have a case where the question of fraud was fairly presented to and determined by the jury in favor of the intervenors. Now we are asked in substance to say that there is no evidence tending to show that the mortgage was executed in good faith and for an honest purpose. That there is evidence which tends to show that the transaction was fraudulent will be conceded, but that this clearly appears we are unable to say. On the contrary, we think there is evidence on which the verdict can be fairly sustained. At most, different minds might reach different conclusions in relation thereto. It is the settled rule of this court that we cannot set aside the verdict in such case.

1. APPEAL: evidence to support verdict.

II. Evidence was admitted against the objection of the plaintiff tending to show that he had orally agreed to give his wife ten per cent. interest on the money she let him have. It is urged that the court erred in so ruling, because section 2077 of the Code provides that the rate of interest shall be six per cent., unless the parties in writing agree to pay above that rate. The statute does not in terms prohibit the parties from agreeing orally to pay ten per cent.; and where this is done, and the amount afterwards ascertained and an obligation in writing given therefor, we see no reason why such obligation cannot be enforced between the parties, and, if valid as to them, no one else can complain. The parol promise to pay was a sufficient consideration for the written obligation. Clearly, we think the defendant could not successfully plead that there was no consideration for the written promise. *Brockway v. Haller*, 57 Iowa, 368.

2. INTEREST: oral agreement for ten per cent.: validity after execution.

III. The court, on its own motion, submitted the following special interrogatory to the jury: "Was the chattel mortgage in controversy made * * * and received * * * for the purpose of hindering or delaying or defeating the creditors" of the mortgagor? It is urged that this interrogatory is not as broad as the issue whether the mortgage was given and received for the purpose of "hindering, delaying or defrauding" creditors. Under the facts established, or rather under those which the evidence tended to prove, we are unable to see that there is any material difference between "defeating" and "defrauding" creditors; but, abstractly, if there is, we are of the opinion that the jury was not misled thereby, because from the instructions the jury could not fail to understand that the material question was whether the mortgage was fraudulent or not.

3. INSTRUCTIONS: immaterial variance from issues.

IV. It is said that the eighth paragraph of the charge "contains such a confusion of law and facts as to mislead the jury." We are unable to concur in this view. Counsel do not question the instruction, but concede that it is correct, and we are of the opinion that it is

applicable to the evidence, and, when considered with the other instructions, it cannot be misleading. It is also said that the tenth paragraph of the charge is erroneous "under the facts proven." The objection made to this instruction we understand to be this: Mrs. Fenn let her husband have the money when the Revision was in force, and that she failed to file in the proper office a notice of her claim, as provided in section 2500 of the Revision. This question was determined under similar circumstances in *Jones v. Brandt*, 59 Iowa, 332, and, following that case, we must hold that the instruction is not erroneous. What we have said as to the rate of interest the defendant agreed to pay sufficiently indicates that the objections to the tenth paragraph of the charge are not well founded.

4. HUSBAND and wife: husband using wife's money: failure of wife to record claim under Revision: creditors after appeal.

AFFIRMED.

MESSENGER V. VOTAW.

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Contract: TO PAY ANOTHER'S DEBT: MONEY HAD AND RECEIVED: RECOVERY. Plaintiff sold a lot to defendant and received his pay in land. Under the agreement it was his duty to pay certain interest on a mortgage on the lot and certain accrued taxes, but, as a separate transaction, defendant agreed to pay such interest and taxes for plaintiff, in consideration of receiving the latter's promissory note for the amount. The note was given and paid, but defendant neglected to pay plaintiff's said debts. His creditors were not parties to the arrangement, and there was no subrogation. *Held* that plaintiff could recover of the defendant the money paid on the note, and interest, without himself first paying the debts which defendant had agreed to pay.

Appeal from Marshall District Court.—HON. J. L. STEVENS, Judge.

FILED, SEPTEMBER 10, 1888.

THE petition alleges, in substance, that on or about the twenty-sixth day of May, 1887, the plaintiff sold to

defendant a part of a certain town lot, and received in payment one hundred and fifteen acres of land; that at the time of the sale there was a mortgage of thirty-five hundred dollars on the lot, on which there was then due interest to the amount of one hundred and fifty dollars; that at the time of the sale it was the duty of plaintiff to pay interest on the mortgage to April 12, 1887, and taxes of 1886, in all amounting to two hundred and ten dollars; that defendant, by a verbal agreement, assumed the payment of said interest and taxes in consideration of receiving the note of plaintiff for two hundred and ten dollars; that plaintiff gave his note to defendant, and has since paid the same in full; that the note was so paid for the purpose of paying the interest and taxes aforesaid, but defendant neglected and refused to pay the same, and appropriated the money received to his own use, to the damage of plaintiff in the sum of two hundred and thirty dollars. A demurrer to the petition was filed and overruled. Defendant electing to stand on the demurrer, judgment was rendered in favor of plaintiff for $219.03. Defendant appeals.

Binford & Snelling, for appellant.

Caswell & Meeker, for appellee.

ROBINSON, J.—It is claimed by appellant that as between themselves the plaintiff by virtue of the agreement in question became the surety of defendant, and therefore that, before the plaintiff can recover, he must show that he has paid the interest and taxes to which the agreement refers. The cases of *Moses v. Clerk of Dallas County*, 12 Iowa, 139, and *Wood v. Smith*, 51 Iowa, 161, are relied upon as sustaining this claim. The petition shows that the property sold by plaintiff was paid for in land. It is not shown that the contract in controversy was any part of the agreement of exchange. On the contrary, it appears to have been an independent transaction. The consideration for it was not the sale of property, but the making and delivery of the note of plaintiff for the amount of the taxes and interest. It is

not, therefore, the case of one who buys mortgaged realty, and, as a part of the price to be paid, agrees to discharge the mortgage debt. It is well settled that where one person makes a promise to another for the benefit of a third, the party to be benefited may maintain an action on the promise. *McHose v. Dutton*, 55 Iowa, 730; *Lawrence v. Fox*, 20 N. Y. 268. "But it is not every promise made by one to another, from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration." *Simson v. Brown*, 68 N. Y. 361; *Garnsey v. Rogers*, 47 N. Y. 240. To enable a third party to sue upon such a contract, it must have been made for his benefit; and if its primary object was to subserve the interests of one or both of the parties to the contract, they alone can maintain an action thereon for its breach. In this case there was no subrogation. The parties entitled to the interest and taxes were not parties to the agreement, and have not assented to it. It is not shown that they were benefited by it, nor that they have any interest in it. The petition shows quite clearly that the agreement was for the benefit of plaintiff. It required the discharge of plaintiff's obligations by defendant, and he received the note, and afterwards the money, in consideration of his undertaking. Instead of carrying it out, he refuses to do so, while retaining the money. His only defense seems to be that the plaintiff has not yet discharged these obligations, and, since they are liens on the real estate he sold, they may yet be enforced against such realty. But we are not required to indulge in such a presumption. By means of the agreement, and defendant's failure to perform it, plaintiff has lost his money, while his relation to the debts is unchanged. His damage is evidently the amount of the obligations in question, with interest. We conclude that the demurrer was properly overruled. The judgment of the district court is therefore

AFFIRMED.

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ELWOOD V. PRICE.

1. **Intoxicating Liquors**: ILLEGAL SALES BY REGISTERED PHARMACIST: KNOWLEDGE: EVIDENCE. The evidence in this case considered (see opinion), and *held* to show that the defendant, a registered pharmacist, not only made illegal sales of intoxicating liquors himself, but that he must, as a reasonably intelligent man, have known of such illegal sales made by his clerk, notwithstanding his claim to the contrary.

2. ——— : NUISANCE: INJUNCTION: PRIOR CESSATION. In such case where the illegal sales had been continued for years, but the clerk, whom the defendant claimed was alone guilty, had been discharged a few weeks before a suit to enjoin the nuisance was begun, and no other change in the business was shown, *held* that the action could not be defeated on the ground that no nuisance existed when the action was co mmenced, especially as there was evidence tending to show illegal sales by defendant himself after the discharge of the clerk. (See opinion for cases followed and distinguished).

Appeal from Howard District Court.—HON. C. T. GRANGER, Judge.

FILED, SEPTEMBER 10, 1888.

ON the sixth day of March, 1887, the plaintiff filed his petition in this cause, in which he charges that defendant has established and is now maintaining on lot 4, in block 4, Park addition to Cresco, in Howard county, a place for the illegal sale of intoxicating liquors; that defendant has heretofore sold and continues to sell in said place intoxicating liquors as a beverage, and owns intoxicating liquors which are kept in said place for the purpose of sale; that defendant is a registered pharmacist, and has a permit from the board of supervisors of Howard county authorizing him to buy and sell intoxicating liquors as such pharmacist for the actual necessities of medicines only; that defendant is abusing his trust as a pharmacist, and is keeping a nuisance in the place named.

Plaintiff asks that the nuisance be abated, and that defendant be enjoined from keeping and selling intoxicating liquors. Defendant denies all the allegations of the petition excepting so much as alleges that he is a pharmacist holding a permit of the board of supervisors. The case was tried to the court, and a decree rendered for the abatement of the nuisance and the closing of the building in which the business was carried on, as provided by law. Defendant appeals.

John McCook and *C. Wellington*, for appellant.

W. K. Barker and *H. T. Reed*, for appellee.

ROBINSON, J.—I. Defendant's permit to sell was issued on the eighteenth day of June, 1886. The evidence convinces us that intoxicating liquors have been sold in defendant's place of business for years contrary to law. Most of the sales proven were made after the eighteenth day of June, aforesaid. Sales were made frequently, and to numerous persons, including minors and persons in the habit of becoming intoxicated, for use as a beverage. The violations of law shown were gross and persistent. We do not understand counsel for appellant to seriously deny that this is true. If we understand their claim, it is that, although there may have been illegal sales, yet they were made without the knowledge or consent, and contrary to the instructions, of defendant, by a clerk named Meyers. The evidence shows that more illegal sales were made by Meyers than by defendant, but it also shows that the business was mainly conducted under the personal supervision of defendant. Much of the liquor sold was drank on the premises. In some cases applications for liquors were made on forms approved by the commissioners of pharmacy; but a large share of these were signed with fictitious names, although the persons so signing were well known. In a number of cases two or more sales of from half a pint to a pint of whisky in each case were

1. INTOXICATING liquors: illegal sales by registered pharmacist: knowledge: evidence.

made to the same person on the same day. In several instances larger quantities were sold. The illegal business was carried on in such a manner that no one in the position occupied by defendant, possessed of ordinary intelligence and business tact, could have been ignorant of it, or of such facts as would have charged him with notice. The monthly reports which were made and filed with the county auditor contained abundant information to put defendant upon inquiry, if he was really ignorant of the facts. But we are satisfied, not only that he knew of the illegal sales, but that he made some of them. It is true that he swears that he never permitted any one to drink liquors on the premises, and that he never kept for sale, nor sold contrary to law, any intoxcating liquors during the time in question, and that he did not know of such sales by Meyers. His testimony is, however, contradicted by a very decided preponderance of the evidence.

II. Counsel for appellant state that "the principal question to be determined is, did the nuisance sought to be enjoined exist at the commencement of this action?" They insist that before the decree sought by plaintiff can be rendered it must be made to appear that the nuisance actually existed when the action was commenced, or that it is being maintained. Section 12, chapter 143, Acts Twentieth General Assembly, contains this language: "Any citizen of the county where such nuisance exists or is kept or maintained may maintain an action in equity to abate or perpetually enjoin the same." Section 1, chapter 66, Acts Twenty-first General Assembly, makes it the duty of the county attorney, "when any such nuisance exists," to prosecute an action for its abatement. Section 2 of the same chapter makes it the duty of the proper court or judge in certain cases to grant an injunction, if it be made to appear "that such nuisance actually exists, or is being maintained." It is argued from these provisions that it was improper to issue an injunction, or render a decree of abatement in this case, because it is alleged that the

2. ——: nuisance: injunction: prior cessation.

evidence shows no illegal sale made after the nineteenth day of February, 1887, and therefore that no nuisance is shown to have existed on the sixth day of the next month, when this action was commenced. The case of *Shear v. Brinkman*, 72 Iowa, 698, is cited by counsel as supporting their views. But the facts in that case were that the illegal business was carried on in leased property, and that the owner, upon being informed that illegal sales of liquors were being made, caused the tenant to be notified that he must not sell any liquor in the leased building, and he ceased to make such sales prior to the commencement of the suit. New leases were made, but no illegal sales were shown to have been made under the new leases, nor after the tenant stopped selling under the old one. There was nothing tending to show a want of good faith in these proceedings. The facts justified the court in finding that the illegal traffic had been abandoned, and the nuisance abated, before the action was commenced. The same principle was involved in the case of *Drake v. Kingsbaker*, 72 Iowa, 441. In this case defendant does not claim to have changed his business, but denies that it was or is illegal. The only change shown is the discharge of Meyers on the nineteenth day of February, 1887. In the absence of satisfactory evidence we cannot presume that an illegal business which had been carried on for years was abandoned two weeks before the petition was filed, because a clerk who had assisted in the business was at that time discharged. There is, however, direct evidence that illegal sales were made by defendant after Meyers left, and after this action was commenced. The facts of this case bring it within the rule announced in *Judge v. Kribs*, 71 Iowa, 183. We conclude that the decree of the district court is sustained by the evidence. It is therefore

AFFIRMED.

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FISHER v. CASS COUNTY DISTRICT COURT *et al.*

Liquor Nuisance: INJUNCTION: CONTEMPT: TITLE OF CAUSE: AFFIDAVIT BY ALIEN: APPEARANCE FOR STATE: EVIDENCE. At the suit of H. the plaintiff was enjoined from violating the prohibitory liquor law. In a subsequent proceeding, based on the affidavit of B. (who was at the time an alien), and entitled in the name of the state *versus* the plaintiff, he was adjudged guilty of contempt in violating the injunction. To B.'s affidavit, and as a part thereof, was attached a duly-authenticated copy of the writ of injunction and the service thereof. In the contempt proceeding, one C. at first appeared as counsel for the state, but before the hearing on the merits the county attorney appeared and prosecuted the cause for the state, and defendant was adjudged guilty of contempt. *Held*—

(1) That the contempt proceeding was properly brought in the name of the state, instead of in the name of the plaintiff in the injunction suit,—it being a proceeding criminal in its nature, and only incidental to the original cause.

(2) That, whether C. had a right to appear for the state or not, the appearance of the county attorney gave the court full jurisdiction to proceed with the complaint.

(3) That B., though an alien, was competent to make the affidavit as the basis of the proceeding.

(4) That it was not necessary to introduce in evidence the original writ of injunction and service thereof, since authenticated copies were before the court, attached to the affidavit.

Certiorari to Cass District Court.—HON. C. F. LOOFBOUROW, Judge.

FILED, SEPTEMBER 10, 1888.

THIS is a proceeding in *certiorari* by which it is sought to reverse the order and judgment of the district court of Cass county in an alleged contempt of said court in violating an injunction issued in an action to restrain and abate a nuisance. The plaintiff was held in contempt, and a fine of five hundred dollars was adjudged against him.

L. L. DeLano, for plaintiff.

A. J. Baker, Attorney General, and *John W. Scott*, County Attorney, for defendant.

ROTHROCK, J.—The record shows that an action for injunction was commenced by R. Hudspeth against the defendant, and that a writ of injunction was issued on the tenth day of May, 1885, and served on the plaintiff on the sixteenth day of the same month. On the thirty-first day of January, 1887, a motion was filed asking for an order on the plaintiff to show cause why he should not be punished for contempt of the court in violating said injunction. It was alleged in this motion that plaintiff had been guilty of repeated violations of the writ. The motion was entitled in the name of "The State of Iowa *vs.* E. G. Fisher," and it was supported by the affidavit of one Bonesteel; and a duly authenticated copy of the injunction, and of the service thereof upon said Fisher, were attached to and made part of the affidavit. A precept was issued, and Fisher was brought before the court to answer to the charge. He filed a motion to quash the proceeding, because the complaint for a violation of the injunction was not made by Hudspeth, the plaintiff in the action for injunction, but by one Bonesteel, who is not shown to have any interest in said original action wherein the injunction was granted. Thereupon the said Bonesteel filed another affidavit, in which he averred that he was a citizen of Cass county, and that Hudspeth had become a non-resident of the state of Iowa, and said Bonesteel in said motion claimed the right as a citizen of the county to demand that defendant be punished for violating the injunction. At the same term of court, Hon. John W. Scott, county attorney, appeared and filed a motion to permit and direct the cause to proceed in the name and interest of the state of Iowa, and that the defendant therein be tried and dealt with, and, if found guilty, punished as provided by law. The defendant filed a motion to strike out the additional affidavit of Bonesteel, and the

motion of the county attorney. The motion to strike out was overruled. It appeared on the hearing of this motion that Bonesteel became naturalized as a citizen some two or three days after he made the original affidavit in the case. The plaintiff herein entered a plea of not guilty, and a trial was had upon evidence introduced by the parties, and, as has been said, the plaintiff was adjudged guilty of contempt.

It is insisted by counsel for the plaintiff that the court exceeded its jurisdiction and acted illegally in entertaining the proceeding for contempt, because it was not instituted by Hudspeth, the plaintiff in the original action for injunction. This was not necessary. The proceeding to punish a contempt of the process of a court is criminal in its nature, and by it a disobedience to civil authority is punished. It is merely incidental to the original proceeding, and need not be entitled as of the original cause. *First Congregational Church v. City of Muscatine*, 2 Iowa, 69. It was therefore properly docketed as a separate proceeding in the name of the state as plaintiff; and the appearance of the county attorney in behalf of the state was fully authorized by law. An examination of the many cases for contempt in this court will show that they are usually brought in the name of the state. This proceeding was properly commenced. It is true, the county attorney did not appear and file the original motion in the case. It appears to have been prepared and filed by H. G. Curtis, as attorney for the state. Whether he had the right to appear we need not determine. There can be no doubt that when the county attorney appeared in behalf of the state the court had full jurisdiction to proceed with the complaint, and it is entirely immaterial whether Bonesteel was a citizen when he made the original affidavit. He was not a party to the proceeding, and he was competent to make an affidavit.

It is claimed that no writ of injunction and service thereof was introduced in evidence upon the hearing. It is true that no such evidence was formally introduced. But this was not necessary. The motion and

affidavit for the precept had attached thereto a certified copy of the injunction and the service thereof. They were made part of the motion and affidavit. They were of record in the case, of which the court would take notice, and were evidence of equal credibility with the original writ of injunction and service. We discover no error in the proceedings of the district court.

AFFIRMED.

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MARTYN V. LAMAR *et al.*

1. **Appeal**: OBJECTION TO PETITION: TOO LATE. Where defendant answered the petition, went to trial and introduced his evidence, and did not attack the sufficiency of the petition in any form, either before or after verdict, *held* that he could not do so on appeal.

2. ———: MEANING OF "RECORD": TOO TECHNICAL. After defendant had introduced his evidence, the plaintiff moved the court to instruct the jury to find a verdict in his favor "based upon the record that has been made in the case." An objection in this court that the motion was not based on the evidence, because it had not yet been made of record, *held* too technical for consideration, in view of the evident meaning of the words as used.

3. **Promissory Note**: GUARANTOR: DISCHARGE: BURDEN OF PROOF. Before a guarantor of a note can be discharged by the failure of the holder to give him notice of non-payment, he must show by proper evidence that he has been prejudiced by such failure.

Appeal from Buena Vista District Court.—HON. LOT THOMAS, Judge.

FILED, SEPTEMBER 10, 1888.

ACTION upon a promissory note, which was executed by the defendants H. C. & S. H. Lamar to their co-defendant William Conley, on the fourteenth day of September, 1885, due eight months after date. On the twenty-third day of December, 1885, the defendant William Conley transferred the note to the plaintiff, and by a separate instrument in writing guaranteed the payment thereof. Judgment was rendered for the plaintiff against the makers of the note, and a trial by jury was had as to the liability of Conley, the guarantor. The defendant introduced his evidence, and at the close thereof the plaintiff asked that the jury be instructed to

find a verdict in his favor for the amount due on the note, "based upon the record that has been made in the case." The motion was sustained. A verdict was returned for the plaintiff, upon which judgment was rendered, and defendant Conley appeals.

Goldsmith & Hart, for appellant.

Wm. Milchrist, for appellee.

ROTHROCK, J.—I. The counsel for appellant make a question upon the sufficiency of the petition. It is claimed, because the plaintiff requested the court to instruct the jury to return a verdict for the plaintiff upon the record made in the case, that the motion had no reference to the evidence, because it had not then been made of record, and that it was error to order a verdict upon the pleadings; and it is insisted that the petition does not constitute a cause of action against the defendant. These objections come too late. The defendant answered the petition, went to trial, introduced his evidence, did not attack the sufficiency of the petition in any form, either before or after verdict, and he cannot be permitted to do so now, and the objection that the motion was not based upon the evidence is too technical for consideration here. The motion, in its reference to the record, evidently referred to the case as then presented, including the evidence.

II. It is conceded that it was incumbent on Conley as a guarantor to show by proper evidence that he was prejudiced by the failure of the plaintiff to give notice of non-payment at the maturity of the note. See *Sabin v. Harris*, 12 Iowa, 90. The defendant, by his answer, pleaded that he was prejudiced by the failure of plaintiff to give notice of non-payment; and he sought by his evidence to establish this fact. He claims that he did introduce sufficient evidence of the fact to require the case to be submitted to the jury. A careful examination of the evidence leads us to the conclusion that the court correctly held that there was no evidence of prejudice. We need not set out nor discuss the evidence.

III. Objection is made by appellant to an order of the court striking out the testimony of a witness. The ruling was clearly correct, upon the ground that said testimony was hearsay. We find no error in the record. AFFIRMED.

ROBINSON, J., having been of counsel in this case, took no part in its determination.

GRONEWEG & SCHOENTGEN v. KUSWORM.

1. **Appeal:** AMENDMENT OF ABSTRACT: TIME. An appellant has a right to file an amendment to his abstract, when done before the argument of appellee is served on him, and in ample time to permit appellee to make any argument he desires on the record as amended.
2. **Evidence:** NOT RELEVANT TO ISSUES. In an action for money loaned, evidence showing liability for failure to pay a draft is irrelevant.
3. **Agency:** APPARENT AUTHORITY OF AGENT AFTER DISCHARGE. The fact that defendant had honored several drafts drawn by their traveling salesman for personal expenses and indorsed at his request by plaintiffs while he was yet in defendant's employment, did not bind defendant to pay another draft drawn and indorsed by the same parties after his discharge, even though plaintiffs had no knowledge of such discharge. (Compare *Baudouine v. Grimes*, 64 Iowa, 370).

Appeal from Pottawattamie District Court.—HON. C. F. LOOFBOUROW, Judge.

FILED, SEPTEMBER 10, 1888.

THIS is an action at law, by which plaintiffs, as appears from the averments of their petition, seek to recover of the defendant the sum of nine hundred dollars and interest for money advanced to defendant to be repaid by defendant. In other words, the cause of action set forth in the petition is to recover for money loaned. The answer was a general denial. There was a trial by jury, and a verdict and judgment for the plaintiffs. Defendant appeals.

Sapp & Pusey, for appellant.

Wright, Baldwin & Haldane, for appellees.

ROTHROCK, J.—I. The record in the case is attacked by a motion filed by appellees, based upon several grounds. The motion is supported by affidavits, and there are counter-affidavits filed by appellant. Appellees seek to strike out part of the amended abstract filed by appellant. This part of the motion is not well taken. The amendment appears to be supported by the record, and it was filed in January, 1888, and before the argument of appellees was served on appellant, and in ample time for the appellees to present any argument they desired upon the record as amended. The motion also asks that certain parts of the bill of exceptions be stricken from the record, and that the case be affirmed. These grounds of the motion will be overruled. They are not well taken in point of fact. The appellant's assignments of error are also attacked as being too indefinite and general. It is only necessary to say in reference thereto that the material errors in the case are sufficiently pointed out in the assignments.

1. APPEAL: amendment of abstract: time.

II. It will be observed that the plaintiffs, by their petition, sought a recovery upon a claim for money loaned. They introduced evidence, and sought a recovery as accommodation indorsers of a draft drawn by one Schweizer upon the defendant, which was protested for non-payment. The draft and indorsements were in the following words:

2. EVIDENCE: not relevant to issues.

"$100. COUNCIL BLUFFS, IA., 6-15-1885.

"Pay to the order of First National Bank, C. Bluffs, Ia., one hundred dollars, with exchange and collection charges, value received, and charge the same to the account of I. SCHWEIZER.

"To D. Kusworm, Cincinnati, O."

On the back of said draft are the following indorsements:

oneweg & Schoentgen: Pay Union National
nicago, or order, for account of First National
ouncil Bluffs, Ia.

"S. FARNSWORTH, Cashier.

y ——— or order, for collection, on account of
tl., Chicago.

"U. C. OAKLEY, Cashier.

otested June 18, 1885. No. 10,513.

"ALBERT PADDOCK, N. P."

n pencil is written the following: "Do not
one cent; has been discharged some time ago."
of the plaintiffs testified in regard to the trans-
follows: "Mr. Schweizer called, and said he
of money, and needed money for traveling
, and asked me to cash his draft on D. Kusworm
r whom he was traveling and selling goods.
nt a draft on D. Kusworm and indorsed it, and
o the bank and got his money. That draft was
bout four or five weeks later he called again.
ie usually arranged it to draw money in Council
hat he was again out of funds, and wanted to
would cash his draft on Mr. Kusworm for one
dollars. I indorsed the draft, and he got the
n it. That draft was also paid. About six
er Mr. Schweizer called again, and said he had
another draft for traveling expenses. I made
raft and indorsed it, and he went to the bank
he money. About four or five days later that
ie back protested, not paid, and we refunded to
the amount of the draft, with protest fees."

He furher testified, in substance, that he had no knowledge when he indorsed the last draft that Schweizer was
in the employ of Kusworm, the defendant. All
vidence was objected to by the defendant as
tent and immaterial, and the objection was over-
It ought to have been sustained. The action was
er borrowed money; and the evidence, instead
ing the case made in the petition (if competent
form of action), tended to show a liability for
o pay a draft drawn upon the defendant. The

evidence introduced upon a trial must have some relevancy to the issues made in the pleadings.

III. As this case is to be remanded to the court below for a new trial, it is proper that we should determine the question made by counsel as to whether the evidence as it appears in the record shows any liability of the defendant. The facts presented in evidence are in all essential respects like the case of *Baudouine v. Grimes*, 64 Iowa, 370, where we held that the drawee was not liable. In that case, as in this, previous drafts had been paid by the drawer. An examination of that case will show that it is decisive of this.

3. AGENCY: apparent authority of agent after discharge.

REVERSED.

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97 688

SCHULTZ v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Appeal: FROM JUSTICE'S COURT: AMOUNT IN CONTROVERSY: REMITTITUR. In an action in justice's court plaintiff claimed forty dollars, and the jury brought in a verdict for that amount, whereupon plaintiff remitted all but $24.99, and judgment was entered for that amount; but before judgment was entered defendant filed an appeal-bond. *Held* that the amount in controversy for the purposes of an appeal from the judgment was only $24.99, and that, therefore, an appeal would not lie; and that it was immaterial whether the bond was filed before or after the *remittitur*, since there could be no appeal until after judgment, and the bond could be of no effect before its rendition. (Compare *Milner v. Gross*, 66 Iowa, 252).

Appeal from Mahaska District Court.—HON. D. RYAN, Judge.

FILED, SEPTEMBER 10, 1888.

THIS action was brought before a justice of the peace, where a trial was had by jury, and a verdict was rendered for the plaintiff for forty dollars. The suit was founded upon a claim for damages for killing a cow by a train on the defendant's railroad. After the verdict was returned, the plaintiff filed a *remittitur* of all the claim

in excess of $24.99. Judgment was entered for that amount. The defendant appealed to the district court. Plaintiff moved to dismiss the appeal. The motion was overruled, and plaintiff appeals.

Carroll & Davis, for appellant.

Thomas S. Wright and *Lafferty & Morgan*, for appellee.

ROTHROCK, J.—The cause involves less than one hundred dollars, and it comes to us upon the following certificate of the trial judge: "I, D. Ryan, judge, before whom the above-entitled cause was tried, do certify that the determination of said cause involves a question of law upon which it is desirable to have the opinion of the supreme court,—the amount in controversy being less than one hundred dollars,—and the following questions of law are involved in this cause, *to-wit*: Where an action is brought before a justice of the peace, claiming forty dollars as damages for the negligent killing of a cow by defendant, trial is had before a jury, and the jury returns a verdict in favor of the plaintiff for the sum of forty dollars, and just as soon as the jury returns their verdict into court the plaintiff files a *remittitur*, sworn to by plaintiff, remitting all the verdict in excess of twenty-four and ninety-nine one-hundredths dollars, and makes no further claim against defendant for the amount in excess of twenty-four and ninety-nine one-hundredths dollars. This was done at the time the verdict was returned by the jury, and before it was made of record by the justice in his docket; and the justice afterwards entered judgment in his docket for twenty-four and ninety-nine one-hundredths dollars. And where the defendant files an appeal-bond, with securities thereto, before the judgment is entered up in said cause by the justice before whom the case was tried, and the justice allowing the appeal to the district court, the plaintiff files a motion in the district court to dismiss defendant's appeal, for the reason that the

amount in controversy is less than twenty-five dollars, the court overruling the motion to dismiss the appeal in said cause. And where the justice's transcript of the judgment shows that the appeal-bond was entered in making up his docket before the entry of the *remittitur* on the docket. It does not appear which was filed first,—the defendant's appeal-bond or plaintiff's *remittitur*. Under all the facts as stated above, should the plaintiff's motion to dismiss the appeal be sustained or overruled, the court overruling said motion and plaintiff excepting at the time to said ruling. The foregoing certificate was made and signed at the time the decision was made in said cause. D. Ryan, Judge."

A question is made as to the order of time in which the appeal-bond and the *remittitur* were filed. We do not think this question is material to the rights of the parties. The appeal-bond was filed before the judgment was rendered. In strictness, the time had not arrived to appeal. The appeal is from the judgment, and not from the verdict. But the appeal-bond would no doubt become operative on the judgment, though filed before the judgment was rendered. But it is to be regarded as filed after judgment. One thing is certain, the *remittitur* was filed before judgment. This brings the case squarely within the rule of *Milner v. Gross*, 66 Iowa, 252, and cuts off the right of appeal, because the amount in controversy when the appeal is taken determines the right thereto. We think the motion to dismiss the appeal should have been sustained.

REVERSED.

THE STATE v. PRICE.

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87 694

1. **Liquor Nuisance: INDICTMENT.** The indictment in this case charged that defendant did unlawfully establish, keep, use and maintain a certain building and place in which he owned and kept intoxicating liquors, to-wit: * * * with intent to sell and give the same away contrary to and in violation of the laws of Iowa, and did at the aforesaid times and place so unlawfully sell and give away such intoxicating liquors. *Held* that this sufficiently charged the *keeping of the place* in which the forbidden acts were done, and therefore was a good indictment for nuisance. [REED, J., not concurring.]

2. ——: **INSTRUCTION: ERROR WITHOUT PREDUDICE.** The court instructed the jury that "any person who, without a permit, sells intoxicating liquors in a building or place, or keeps intoxicating liquors in such place with intent to sell the same, is guilty of a nuisance." *Held* inaccurate, because the crime of nuisance consists in *keeping the place* where the liquors are unlawfully kept and sold, and not in the unlawful keeping and selling of the liquors; but that it was without prejudice, because, in view of the evidence and the other instructions, the jury could not have been misled by it.

3. ——: ——: **PARTIAL STATEMENT OF LAW.** An instruction given in this case did not correctly state the law as applied to the main issue in the case, but it was given to warn the jury against a misapprehension which was likely to arise from a claim urged by defendant on the trial, and it was well adapted to that purpose. *Held* that, since the jury could not have misunderstood its special purpose, and could not have been misled by it, it was no ground for complaint on appeal.

4. ——: **PHARMACIST: EXCESSIVE FINE.** In this case a registered pharmacist with a permit to sell intoxicating liquors was found guilty of a nuisance, and was fined four hundred dollars. He now insists that this fine is excessive, on the ground that his violation of the law was committed solely through a mistake as to its meaning. But it appearing from the record that the court below was warranted in finding that the defendant had violated the spirit as well as the letter of the law, *held* that the fine was not excessive.

Appeal from Howard District Court.—HON. C. T. GRANGER, Judge.

FILED, SEPTEMBER 10, 1888.

THE defendant was convicted of the crime of nuisance, and he appeals from the judgment pronounced against him.

John McCook and *Cyrus Wellington*, for appellant.

A. J. Baker, Attorney General, for the State.

REED, J.—I. Omitting its merely formal parts, the indictment is as follows: "The grand jury * * * do aver, find and present that H. C. Price, at and within said county, on or about the first day of April, A. D. 1887, and prior thereto, in said Howard county, and to-wit, in the town of Cresco therein, did unlawfully establish, keep, use and maintain a certain building and place in which he owned and kept intoxicating liquors, to-wit: * * * with intent to sell and give the same away, contrary and in violation of the laws of Iowa, and did at the aforesaid times and place so unlawfully sell and give away such intoxicating liquors, and so permitted the same to be sold and given away at such place. * * *" Defendant moved in arrest of judgment on the ground that the facts charged in the indictment do not constitute an indictable offense. The point urged is, that the language of the indictment charged only that defendant kept intoxicating liquors with intent to sell the same contrary to law, and that he sold such liquors contrary to law, neither of which is an indictable offense, but is triable on information before a justice of the peace. A majority of the court are of opinion, however, that the indictment charges with sufficient explicitness that defendant established, kept, used and maintained a building and place in which he kept intoxicating liquors with intent to sell the same contrary to law, and in which he sold such liquors contrary to law. I do not concur in that opinion. In my judgment the words "establish, keep, use and maintain building and place," as used in the [illegible] meaningless. While the rule establi[illegible] criminal

1. LIQUOR NUISANCE: INDICTMENT.

pleadings is liberal, the essential requisites of an indictment have not been dispensed with. The facts constituting the offense must be stated in ordinary and concise language. Code, sec. 4296. The language in question is not concise. Neither is it that ordinarily used to express the thought intended.

II. The district court gave the following instruction: "Under the law of this state, any person who, without a permit, sells intoxicating liquors in a building or place, or keeps intoxicating liquors in such place with intent to sell the same, is guilty of a nuisance." It must be admitted that this instruction standing alone does not state the law with accuracy. The crime of nuisance consists in the keeping of a building or place in which intoxicating liquors are kept with unlawful intent, or are sold for unlawful purposes. Code, sec. 1543. It is the keeping of the place in which the forbidden acts are done, rather than the doing of these acts, which constitutes the offense, and if one were to do those acts in a building or place which he was in no manner engaged or concerned in keeping, while he would be responsible for the acts in so far as they are criminal, he would not be responsible for keeping or maintaining the place. But defendant was in no manner prejudiced by the instruction. The evidence shows, without any conflict or doubt, that he was the proprietor of a drug-store, and the sales of liquor made by him were all shown to have been in his place of business, and there is where he kept the liquors. In addition to this, the jury were told in another instruction that they could not convict unless the evidence showed that the sales were made or the liquors were kept in a building or place kept and controlled by defendant. The jury could not have been misled by the instruction complained of. We are not at liberty to reverse because of an erroneous or inaccurate instruction when no possible prejudice could have resulted from it. Code, sec. 4538.

2. —: Instruction: error without prejudice.

III. The court gave the following instruction: "If you should find that the defendant did actually keep

3. —— : —— : partial statement of law.

intoxicating liquors with intent to sell, or did actually sell intoxicating liquors in the year 1885, the fact that he believed that he had the right to sell, or that he acted with an honest purpose, cannot avail to defeat a verdict at your hands. The question with you is, did he actually sell or keep with intent to sell, or both? The question of an honest purpose may avail him at the hands of the court in fixing a punishment if he is convicted, but it is not a question for you." The objection urged against this instruction is, that it also directs the jury to convict upon evidence alone of unlawful sales of intoxicating liquors, of the keeping of such liquors with unlawful intent. But the purpose of the instruction is very apparent. Defendant was a registered pharmacist during the time covered by the indictment. At that time it was a question which had not finally been determined in the courts whether under the law the registered pharmacist might sell intoxicating liquors for medicinal purposes without having obtained a permit from the board of supervisors. The question was decided by this court in December, 1885 (*State v. Bissell*, 67 Iowa, 616), and we held that sales under such circumstances were unlawful. It was urged that, as defendant may have acted in the honest belief that he was authorized by law to make the sales, he ought not to be convicted, and the instruction was given with a view of enlightening the jury on that question. They were directed that while the court might consider those facts, if they were proven, in determining what penalty should be imposed, they could not consider them in determining the question of defendant's guilt. That is the full purport of the instruction, and the jury must have so understood it.

IV. The judgment imposed a fine of four hundred dollars. It was urged that the punishment is excessive and we are asked to reduce it. If it clearly appeared that the liquors sold by defendant were sold for the actual "necessities of medicines," and that he was simply mistaken as to the law, and acted under that mistake, we might be dis-

4. —— : pharmacist: excessive fine.

posed to modify the judgment in respect to the amount of the fine. But that is not shown. The court below was warranted in finding that, while the forms prescribed by the commissioners of pharmacy were complied with, the liquors in many cases of sales were intended to be used as a beverage, and that that fact was known to defendant. The man who, while openly pretending to conform to the law, secretly disregards its spirit and purposes, is no less guilty of a crime than is the one who purposely disregards its commands. The case is not one demanding any interference by this court with the punishment imposed by the judgment of the trial court.

AFFIRMED.

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107 709

THE STATE v. JACOBS.

1. **Liquor Nuisance**: INDICTMENT: AVERMENT OF COUNTY. The indictment in this case charges the keeping of a certain building as a nuisance, "on the first day of May, 1886, and on divers other days or times between said first day of May, 1886, and the finding of this indictment." It then states that "said building * * * *is* situated on (certain described land) in Franklin county, Iowa." *Held* that it sufficiently charges that the building in which the offense was committed *was* in Franklin county.

2. ———: INSTRUCTION: SALE OF BEER PRIOR TO JULY 4, 1884. Prior to July 4, 1884, the sale of beer was not unlawful, and instructions which authorized the finding of defendant guilty of a nuisance in keeping a place for the sale of beer prior to that time were erroneous.

Appeal from Franklin District Court.—HON. D. D. MIRACLE, Judge.

FILED, SEPTEMBER 10, 1888.

DEFENDANT was convicted of the crime of nuisance by the verdict of a jury, and the court pronounced judgment against him imposing a fine, and he appeals.

J. H. Scales, for appellant.

A. J. Baker, Attorney General, for the State.

REED, J.—I. The following is a copy of the indictment: "The grand jury * * * accuse Charles Jacobs of the crime of nuisance, committed as follows: The said Charles Jacobs, on the first day of May, 1886, and on divers other days or times between said first day of May, 1886, and the finding of this indictment, did wrongfully and unlawfully erect, continue and use a certain building and place, in which said building and place the said Charles Jacobs did keep intoxicating liquors with the intent then and there to sell the same in said building and place in violation of law, and did then and there sell the same in violation of law and contrary to the statutes in such cases provided. That the said building and place is commonly known as a brewery, and is situated on the northeast quarter of the southeast quarter of the southwest quarter of section 35, township 90 N., range 19 W., 5 P. M., in Franklin county, Iowa." On the trial defendant objected to the introduction of any evidence in support of the indictment, on the ground that it was not charged therein that the offense was committed in Franklin county; and after the verdict was returned he moved in arrest of judgment on the same ground. The objection is not well founded. The indictment must aver that the offense was committed or is triable in the county in which it was found. But it is sufficient if it can be understood therefrom that the offense was committed within the jurisdiction. Code, sec. 4305, subd. 3. Technical exactness of language is not required. The last clause of the indictment alleges with sufficient certainty that the building and place which defendant is charged in the preceding part of the indictment with having kept and maintained, was situated in Franklin county. True, the averment is that said building *is* situated, etc., and, technically, this fixes its location at the time the indictment was found, while the offense was committed before that. But the indictment covers not only the day designated therein, but all other days between

1. LIQUOR NUISANCE: INDICTMENT: AVERMENT OF COUNTY.

that and the day on which it was found. The averments, in effect, are that defendant did, on the twenty-sixth day of May, 1886, use, and continuously from that day to this has used, a building and place which is situated in Franklin county, for the unlawful purpose charged. Very clearly, we think, the averment as to the location of the building should be understood as referring to its location at the time of the unlawful use.

II. The district court instructed the jury that the defendant might be convicted if the evidence showed that he maintained and used the building described for the unlawful purpose charged at any time within three years before the finding of the indictment, which was March 24, 1887; also that beer is an intoxicating liquor, the sale or keeping for sale of which is prohibited by the statute. Appellant set out in his abstract what he claims was the evidence introduced on the trial. But it was shown by an amended abstract filed by the attorney general, the correctness of which was not denied, that the evidence was not preserved either by a bill of exceptions or in the manner prescribed by section 4436 of the Code, and we cannot therefore consider what was set out by appellant as the evidence. But the presumption is that the instructions were based upon the evidence. Under them, then, defendant might be convicted upon proof that he kept a place in which he sold beer, or kept it for sale, at any time between March 24, 1884, and March 24, 1887. But the statute which prohibits the sale of beer, and the keeping of that liquor for sale, did not take effect until July 4, 1884. Laws 1884, ch. 143; Code, sec. 34; Const., sec. 26, art. 3. Before the taking effect of that act the sale of beer or the keeping of it for sale was lawful. Code 1873, sec. 1555. The instructions are therefore erroneous, in that they would permit the conviction of defendant on proof that he did an act which was not prohibited by law when done, and the presumption in the absence of the evidence is that they were prejudicial.

2. ——: instruction: sale of beer prior to July 4, 1884.

REVERSED.

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80 511

75 250
108 589

GRIFFIN v. TURNER *et al.*

1. **Tax Title:** STATUTE OF LIMITATIONS: WHEN TAX TITLE NOT BARRED. A tax title is presumed to be valid, and under it the holder has constructive possession of unoccupied land, so that an entry upon it by the holder of the patent title is presumed to be a trespass, and until such entry is made the holder of the tax title has no occasion to do anything to establish his title as against the claimant under the patent title. Accordingly, where defendants had a tax title, and plaintiff, the holder of the patent title, made no claim to the land of which defendants were bound to take notice, until two days prior to the expiration of five years from the recording of their tax deed, when he took possession and made improvements, *held* that such taking possession within the five years did not estop them from claiming under their tax title after the expiration of the five years. (Compare *Francis v. Griffin*, 72 Iowa, 23, and other cases cited in opinion).

2. ———: BUYING IN ONE'S OWN LAND. Plaintiff, in an action to quiet his patent title as against defendants' tax title, insisted that defendants' tax title was invalid, because in acquiring it, they but paid the taxes on their own land. But *held* (1) that it was not shown to have been their land, and (2) that, if it were conceded to have been theirs, then plaintiff must fail, because his title was taken subject to actual notice of whatever right they had in the land.

Appeal from Clay District Court.—HON. GEORGE H. CARR, Judge.

FILED, SEPTEMBER 10, 1888.

ACTION in equity to quiet the title to real estate. After a trial by the court the petition of plaintiff was dismissed, and he appeals.

Hughes & Chamberlain, for appellant.

Parker & Richardson, for appellees.

Griffin v. Turner.

ROBINSON, J.—Plaintiff claims to be the owner in fee-simple of the south half of the southeast quarter of section 6, township 94, range 35, in Clay county. This land was entered on the twenty-fifth day of May, 1857, by Jane Bruce. On the first day of December, 1859, a patent therefor was issued to her assignee, Edward A. Fuller, but never recorded. On the twenty-third day of July, 1884, Ed. Fuller and wife executed a deed to plaintiff for the consideration of twenty-five dollars, "conveying their interest in and to" the land in question. This was never recorded. The defendant Mary T. Turner claims to own the land by virtue of a treasurer's deed, executed to her pursuant to a sale made on the fifth day of November, 1877, for the delinquent taxes of 1876. This deed was recorded on the seventh day of April, 1881. The defendant Thomas F. Turner is the husband of his co-defendant. He alleges that he purchased the land in 1866, in good faith, and has ever since paid all taxes thereon, believing that he was the owner; that after his purchase he discovered a defect in his chain of title as recorded, and that to perfect his title of record, and cure defects therein, he permitted the land to go to tax sale, and bid it in, and afterwards paid all taxes thereon.

I. The evidence shows that on the fifth day of April, 1886, the plaintiff caused to be hauled onto this land two loads of lumber. On the next day carpenters erected thereon a building about twelve by sixteen feet in size, and eight feet high. It was built on blocks, and leveled up, but had neither door nor window. The roof was made of common lumber, and the sides were of the same material. There was no floor. One witness states that the building was adapted for use as a dwelling or stable. After this building was erected, and during the same month, plaintiff caused three acres of land to be broken. Prior to April 5, 1886, the land was unbroken prairie, without improvements of any kind, and had never been in the actual possession of any one. Plaintiff insists that defendants are barred from now asserting title under the tax deed

1. TAX TITLE: STATUTE OF LIMITATIONS: WHEN TAX TITLE NOT BARRED.

by reason of the provisions of section 902 of the Code. The defendants have resided in Illinois since 1866. In 1868 the husband visited Clay county, Iowa, and inspected the land. He redeemed it from a sale for the delinquent taxes of 1864-65, and paid all subsequent taxes to and including those for 1885, although those for 1876 were paid through the medium of a tax sale. Turner discovered the defect in his title, and in 1870 corresponded with Fuller in regard to it. In this correspondence Fuller stated that he believed he had purchased a parcel of land in Iowa, from Mrs. Bruce, but, if so, he had sold it. In April, 1877, Turner asked Fuller by letter for a quit-claim deed, but was refused on the ground, that if he had deeded the land once, he could not safely do so again. Fuller's recollection of the land was indistinct. He recalled a trade with Mrs. Bruce involving land, but he seemed to recollect nothing more. He was impressed with the belief that his interest in the land had been conveyed, and made no claim to it; on the contrary, disclaimed any interest in it. Some objection is made to this correspondence, but we think it is competent to show what claim plaintiff's grantor was then making to Turner. The correspondence clearly shows that Fuller made no claim to the land. Turner could not, therefore, have maintained any action against him. Plaintiff obtained a quit-claim deed from Fuller in July, 1884, but, so far as is shown, asserted no title under it, and did not take possession of the land until two days before the period of five years from the date of the recording of the tax deed expired. The evidence certainly justifies us in concluding that neither Fuller nor plaintiff made any claim to the land between the year 1866 and the fifth day of April, 1886, of which defendants were required to take notice. It is of course probable, and no doubt true, that plaintiff intended to assert a claim of ownership from the time he obtained his deed, and it may be that he believed himself to be the owner. But he withheld his deed from the record, and, after he had obtained it, permitted the defendants to pay the taxes of 1884 and 1885. Whether his motive in pursuing

this course was proper or not is immaterial to the issues in this case. Some years before the tax deed was recorded, he had corresponded with Turner in regard to this land, and by that means had knowledge of such facts as charged him with notice of defendants' rights. Appellant insists that by reason of his having taken actual possession within five years from the recording of the deed, the defendants are estopped from claiming under their tax deed; citing *Barrett v. Love*, 48 Iowa, 103; *Executors of Griffith v. Carter*, 64 Iowa, 194; *Barrett v. Holmes*, 102 U. S. 651. This court held in *Moingona Coal Co. v. Blair*, 51 Iowa, 448, that the holder of the tax title had constructive possession of the land, if it was unoccupied, by virtue of his tax deed. See, also, *Lewis v. Soule*, 52 Iowa, 13; *Bullis v. Marsh*, 56 Iowa, 747. Under the rule of these cases defendants were in constructive possession of the land until but two days were lacking to complete the bar of the statute in their favor; and so far as they knew or could know, no one was questioning their title. In the case of *Francis v. Griffin*, 72 Iowa, 24, it was said of the purchaser under the tax deed that "until the former owner does something indicating an intention to dispute his title and ownership of the property, he has no cause of action against him. It would be an anomaly in the law to require a party to go into the courts for the vindication of a right which the statute declares in advance is a perfect right, and which is in no manner disputed." If the tax deed was valid when recorded—as we must presume it was, in the absence of a showing to the contrary—the action of plaintiff in taking possession of the land was a trespass. And yet, if the claim made in his behalf is sustained, he will have deprived defendants of their property by means of an illegal act, and without due process of law. When plaintiff took possession the defendants, as he knew, resided in Illinois. It was therefore almost certain that they would acquire no knowledge of plaintiff's act until after the lapse of more than two days' time. We do not think it is the intent of the statute to bar an action by the tax-title owner

under such circumstances. The defendants' right of action did not accrue until the evening of April 5, 1886, at which time the teams of plaintiff were first driven upon the land (*Barrett v. Love*, 48 Iowa, 112); for Fuller had denied any interest in the land, and plaintiff claiming under a quit-claim deed took whatever interest he received subject to this denial of interest. Fuller, having once denied interest with knowledge of Turner's claim of title and purpose in making the inquiry, would be presumed not to have or make any claim adverse to Turner until notice to the contrary was given. Instead of giving such notice, Fuller and his grantee pursued such a course as would tend to strengthen the presumption that no adverse claim was made. Plaintiff admits that the building was erected, in part at least, to take possession of the land within the statutory five years; and we find nothing to justify the conclusions that his delay in taking possession until almost the last day of that period was the result of accident. It is the policy of the law to give to every one an opportunity to assert and protect his rights. The acts of Fuller and his grantee were well calculated to prevent this. We are of the opinion that under the facts in this case defendants are not estopped from asserting their tax title as a defense. This is in accord with the spirit and intent of the law. See *Francis v. Griffin*, *supra*.

II. We have treated the title conveyed by the tax deed as held by defendants in common. The evidence shows that the husband bought the land at tax sale for the purpose of protecting the title which he supposed that he held. He assigned the certificate of sale to his wife a short time before the deed was issued. Their money was in a common fund, and the various sums used at tax sale and in paying taxes were taken from this fund. It is claimed by appellant that defendants can claim nothing by virtue of the tax deed, for the reason that they claimed to own the land, and therefore could not acquire a valid tax title, but that the money paid at tax sale was in effect only a payment of taxes. If it be conceded

2. ——: buying in one's own land.

that defendants owned the land when it was sold for taxes, then plaintiff must fail, because he obtained whatever interest he has, charged with notice of defendants' title. But it is not shown that defendants were the owners of the land prior to the execution of the tax deed; therefore they were not at that time under any obligation to pay the taxes, nor to protect the title. Hence, so far as shown, there was nothing to prevent their obtaining a valid tax title. The decision of the district court is AFFIRMED.

SNYDER v. SNYDER *et al.*

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75 255
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1. **Will**: CONSTRUCTION: RIGHT TO TAKE LAND AT APPRAISEMENT. A testator devised all his property to his seven children, share and share alike, and requested that they should partition the real estate fairly and amicably, and, if possible, that they should allow his son (the plaintiff) to have a certain forty acres; but in case they could not agree to such partition, he directed that the plaintiff should "have the first and prior right to purchase the said forty acres and improvements at the price at which it may be appraised, or at such price as can be agreed upon between him and the others." The parties could not agree upon a partition, and plaintiff brought this action to partition the land under the provisions of the will. The court appointed commissioners to appraise the land. *Held* that the will gave to plaintiff the absolute right to purchase the forty acres at its appraised value, and that the other heirs had no right to bid against him therefor.

2. **Partition**: LANDS OF ESTATE: ACTION BEFORE DEBTS PAID. While a partition of the lands of a decedent ought not to be ordered until it is determined that the personal estate is sufficient to pay the debts (*Thomas v. Thomas*, 73 Iowa, 657), yet an action may be begun before that time, and if it does not appear at the time partition is made that it will be necessary to resort to the real estate to pay the debts, the decree ought not to be disturbed.

Appeal from Des Moines District Court.—HON. CHARLES H. PHELPS, Judge.

FILED, SEPTEMBER 10, 1888.

ACTION in equity to partition certain real estate. From a decree directing partition to be made defendants appeal. The facts are stated in the opinion.

T. B. Snyder, for appellant.

T. J. Trulock, for appellee.

ROTHROCK, J.—Andrew J. Snyder died on the third day of August, 1885. At the time of his death he was seized in fee of two hundred and eighty acres of land. The will of the deceased was probated on the twenty-ninth day of September, 1885. He devised to his seven children all of his estate, real, personal and mixed "to have and to take equally, share and share alike." Said will contains the following provision with reference to the partition or division of the land: "It is my request and wish that as soon as practicable after my death my said children mutually and amicably agree upon and effect a just and fair partition of my said real estate and that, if possible to so arrange and divide it, they allow and grant to my son W. J. Snyder the forty acres, with the improvements thereon, now in possession of and occupied by him, upon such reasonable and just terms as may be agreed upon. If said children cannot agree to such partition, or find the same impracticable, and the premises are required to be sold, I direct and require that my said son W. J. shall have the first and prior right to purchase the said forty acres and improvements at the price at which it may be appraised, or at such price as can be agreed upon between him and the others." This action was commenced by said W. J. Snyder on the twenty-second day of April, 1886, to which the six other devisees under the will are made defendants. All of the parties are of full age. It appears from the averments of the petition and answer, and from a counter-claim filed by the defendant, that there is a serious difference of opinion between the plaintiff and defendants as to the rights of the plaintiff under the will. In other words, it is apparent from the record before us that no such amicable division of the real estate could be made as was contemplated by the will, and that it was necessary that partition should be made by a proceeding in court for that purpose. After

1. WILL: construction: right to take land at appraisement.

the court had passed upon certain questions raised by the pleadings, not necessary to be further alluded to in this opinion, it found as a fact that prior to the death of the testator the plaintiff herein was in possession of a certain forty acres of the land, and that by the terms of the will the plaintiff had the right to take said land at its appraised value. Commissioners were appointed to view and appraise all said real estate in parts, and report their proceedings to the court. An appraisement was made by which the value of the forty acres referred to in the will was fixed at one thousand dollars, and the aggregate value of the other lands was found to be fifty-four hundred dollars. The defendants excepted to the report of the commissioners, and moved to set it aside, and in support of the motion filed a number of affidavits, in which it was stated that the forty acres claimed by the plaintiff under the will was appraised at less, and the other lands at more, than their value, and that, by reason thereof plaintiff was given an undue advantage. The motion to set aside the report was sustained, and new commissioners were appointed and a new appraisement made, by which the forty acres named in the will was appraised at one thousand and twenty dollars, and the other lands at fifty-five hundred and sixty dollars. A motion made by defendants to set aside this last report was overruled. This ruling of the court was correct. The motion was founded upon the affidavits submitted on the first motion, with nothing in addition thereto excepting an affidavit charging the plaintiff with improperly influencing the appraisers. But these charges appear to be founded upon mere hearsay. Upon the overruling of this second motion the court made an order setting apart to the plaintiff the forty acres referred to in the will, and confirming and quieting the title thereto in him, and confirming and quieting the title to the remainder of the land in the defendants; and, for the purpose of equalizing the shares in accordance with the appraisement, the plaintiff was ordered to pay to the clerk of the court the sum

of eighty dollars, to be distributed among the defendants.

The defendants contend that, under the provisions of the will, the plaintiff has not the right to take the forty acres mentioned in the will at its appraised value, but that the will gives the plaintiff the first and prior right to purchase the tract at its appraised value, provided the other parties are not willing to pay more than that price for it. And the defendants, by their answer, offered to take the same at forty dollars per acre. Plaintiff claims that he offered, orally, to accept the forty dollars an acre in the court below, but that defendants refused to stand by their offer. This is denied by the defendants, and, it not being of record, we cannot notice it. But the averment of the answ stands, and plaintiff filed an offer in this court to accept forty dollars an acre, which is not accepted by defendants. About all that can be said of this feature of the case is that it tends to show that the claim of defendants that the land is worth forty dollars an acre is not well founded.

We think the district court correctly construed the will. The clause in question plainly contemplates that in case there cannot be an amicable adjustment of the rights of the parties, resort must be had to a legal proceeding in which the land may be required to be appraised, and the provision is absolute that the parties shall have the right to purchase the forty acres in question "at the price at which it may be appraised." There can be no mistake as to the meaning of this clause in the will. No one has the right to bid against the plaintiff for the land. His right to take it at the appraisement is absolute and unqualified.

It is insisted by appellants that the action was prematurely brought. It is true that it was brought within the one year allowed by law for proving claims against the estate. It is averred in the petition that the personal property of said estate is in value largely in excess of all demands against the estate. There is a

2. PARTITION: lands of estate: action before debts paid.

general denial of this averment in the answer filed by defendants; and there is not one word in the record further upon that subject. It does not appear that either party introduced any evidence as to the debts or demands against the estate. So far as the pleadings go, *it* does not appear that there were any debts, excepting by the merest inference. Now it is true a partition of lands should not be ordered until it is determined that the personal estate is sufficient to pay the debts. *Thomas v. Thomas*, 73 Iowa, 657. But it is not a question of jurisdiction. An action may be commenced, and if it does not appear at the time partition is made that it will not be necessary to resort to the real estate to pay the debts, the decree partitioning the lands ought not to be disturbed. The decree was entered in the court below on the thirteenth day of September, 1887. The will was probated on the twenty-ninth day of December, 1885, nearly two years prior to the decree. In view of the fact that the attention of the court below was not called to the question now under consideration, it is fair to assume that it was raised by the parties, and that the estate was then practically settled, and our conclusion is that there was no sufficient reason why the decree should not have been entered up at the time it was entered.

AFFIRMED.

COCKE V. MONTGOMERY *et al.*

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1. **Contracts**: MENTAL INCAPACITY: EVIDENCE. The evidence in this case (see opinion) *held* not to support the claim of plaintiff that her husband, at the time he made the chattel mortgages in question, had not sufficient mental capacity to transact such business.

2. **Chattel Mortgage**: DEATH OF MORTGAGOR: METHOD OF COLLECTING SECURED DEBT. After the death of a mortgagor of chattels, the mortgagee may, upon breach of the conditions of the mortgage, proceed to foreclose by notice and sale under the statute, just as he might have done had the mortgagor survived, and he is not required to file his claim and submit to the slow process of administration to adjust priorities and determine his rights.

3. ——— : OF STOCK OF DRUGS : FORECLOSURE SALE BY ONE NOT A PHARMACIST. It would seem that the law providing that only registered pharmacists shall sell drugs has no reference to stocks of drugs sold under foreclosure or judicial sales.

Appeal from Warren District Court.—HON. O. B. AYRES, Judge.

FILED, SEPTEMBER 10, 1888.

THIS is an action in equity, by which plaintiff seeks to set aside and annul certain mortgages upon a stock of drugs made by her deceased husband to certain of his creditors, upon the ground that at the time he executed the mortgages he was mentally incapable of entering into any contract or transacting any business. There were two cases involving the same questions. They were tried in the district court upon the same evidence, and are submitted to this court in the same manner. The court below entered decrees dismissing the petitions, and plaintiff appeals.

J. E. Williamson and *L. Todhunter*, for appellant.

H. McNeil and *Powell & McGarry*, for appellees.

ROTHROCK, J.—I. It appears from the evidence that A. R. Cocke, the intestate, was for some years engaged in the drug business. He owned a small stock of goods, and was regarded as a good business man. Some time before his death he was injured by falling from a wagon, and he became feeble and emaciated, and gradually failed until his death. It does not appear that he had any affection of the brain, but his mental faculties became weak as his physical powers failed. He was justly indebted to the defendants. He sent for one of them, and proposed to secure his claim by a mortgage upon his stock of goods, and the mortgage was given. The other defendants requested him to secure their claims by mortgage, which was done. There is quite a

1. CONTRACTS : mental incapacity : evidence.

volume of testimony of witnesses as to the mental capacity of the deceased when these mortgages were made. An examination of this evidence leaves but little doubt that the deceased was capable of contracting when he executed the mortgages, and that no advantage was taken of him. Indeed, there can be no other rational conclusion from the evidence. It is true, there is a conflict in the opinions of the witnesses upon the question of mental capacity. But the conflict is mainly in the opinions. When the facts are examined, there is but little ground for controversy upon the question.

II. Some time after the mortgages were given Cocke died, and the plaintiff, who is his widow, was appointed administratrix of his estate. The defendant mortgagees placed their mortgages in the hands of the defendant Montgomery, sheriff, who took possession of the goods, and advertised them for sale to satisfy the mortgages. Plaintiff commenced these suits, and enjoined the sale, and, after the issues were made up, by agreement of the parties, one Buffington, a pharmacist, was selected to sell the stock of drugs, and deposit the money arising from the sale with the clerk of the court. Buffington afterwards sold the stock, and deposited the money as required, and on final hearing the same was ordered to be paid to the mortgagees. It appears that the goods greatly depreciated in value, caused by the delay. But if, as we have found, the mortgages were valid liens, the delay was caused by the plaintiff's interfering with a sale, by these injunction suits. But the plaintiff claims that the defendants had no legal right to assert their liens by seizing the goods under their mortgages and foreclosing by a sale. It is claimed by appellant that the claims of the mortgagees should have been filed as required by section 2408 of the Code; and that the law does not authorize the foreclosure of a chattel mortgage by notice and sale, but that the claims should be filed and take such priority of lien as the court may determine in the regular course of administration. In other words, the claim is that the

2. CHATTEL mortgage: death of mortgagor: method of collecting secured debt.

personal estate is under the control of the administrator for the purpose of selling the same, and paying the debts under the direction of the court; and mortgagees of the personal estate have no lawful right to interfere by seizing the property under their mortgages. The ready answer to this proposition is that the mortgagor's contract did not terminate with his death. Under section 3307 of the Code, and subsequent sections, it was the right of the mortgagees to foreclose by notice and sale. This right did not cease with the death of the mortgagor. There is no provision of the statute which requires the mortgagee of chattels to file his claim, and await the slow process of administration to adjust priorities and determine his rights. If his foreclosure is wrongful, or the debt has been paid, or, as is claimed in the case at bar, the mortgage is invalid, the administrator has ample authority for protecting the estate by injunction, and the transfer of the foreclosure to the district court, as provided in section 3317 of the Code.

III. It is further claimed that, as the mortgaged goods consisted largely of drugs, poisons and medicines, they cannot be sold at public indiscriminate sale, but can be sold only by registered pharmacists. It is provided by section 2, chapter 83, Acts 1886, that "pharmacists, whose certificates of registration are in full force and effect, shall have the sole right to keep and sell, under such regulations as have been or may be established from time to time by the commissioners of pharmacy, all medicines and poisons, including intoxicating liquors, only for the actual necessities of medicines." It does not appear that there were any intoxicating liquors in the stock of goods. But appellant's counsel contend that the medicines and drugs could not be sold by any one but a registered pharmacist, and that the sheriff had no right to proceed with the sale under the mortgage. The position taken by counsel, if entertained, would practically avoid all chattel mortgages of drugs, except in cases where the sheriff who conducts a foreclosure sale is a

3. ——: of stock of drugs: foreclosure sale by one not a pharmacist.

registered pharmacist. It would seem that the law providing that certain qualified persons shall sell this class of property has no reference to sales of stocks of goods under foreclosure or judicial sales. But we need not enter upon the consideration of that question in this case, for it appears that the parties by agreement put the goods in the hands of a registered pharmacist, and that they were sold by him. We think the decree of the district court should be AFFIRMED.

MOORE v. THE CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

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1. **Water and Watercourses:** OBSTRUCTION BY RAILROAD: SURFACE WATER. Water which in the time of a freshet leaves the channel of a stream and spreads over the bottom-land, and is forced back into the channel again by a railroad embankment built across its course, is not to be regarded as surface water in considering the sufficiency of the culvert constructed in the embankment for the passage of the waters of the stream (*Sullens v. Chicago, R. I. & P. Ry. Co.*, 74 Iowa, 659, *followed*); and a company, about to reduce the capacity of its culvert below what the evidence shows will be sufficient to accommodate all of such water, may properly be enjoined at the suit of the owner of the land which will be damaged thereby.

2. ——: OBSTRUCTION: NUISANCE: INJUNCTION: REMEDY AT LAW. The obstruction of the flow of a stream, whereby lands are inundated, is a nuisance, and courts of equity may enjoin the same without averring or proving the insolvency of the defendant. (See *Bushnell v. Robeson*, 62 Iowa, 540).

Appeal from Montgomery District Court.—HON. H. E. DEEMER, Judge.

FILED, SEPTEMBER 10, 1888.

THIS is an action in equity, in which the plaintiff seeks to enjoin the defendant from obstructing the natural flow of the West Nodaway river, by which proposed obstruction it is claimed that the lands of the plaintiff will be inundated and overflown by the waters of said stream. There was a trial to the court, and a decree for the plaintiff. Defendant appeals.

Smith McPherson, for appellant.

C. E. Richards, for appellee.

ROTHROCK, J.—I. The evidence in the case discloses the following state of facts: The plaintiff has been for many years the owner of a farm, which is for the most part situated on bottom-land on the east side of the Nodaway river. The defendant's line of railroad was built through Montgomery county in 1869, and it crosses said river about one mile west of the village of Villisca. When the road was constructed it spanned the river by a wooden Howe truss bridge, which was one hundred and thirty-seven feet in length, and rested on piling driven in the ground. At each end of the bridge there was trestle-work some fifteen feet in height, upon which the railroad track was laid. The length of this trestle-work at the east end of the bridge is about three hundred and sixteen feet, and at the west end it is about four hundred and eighty-five feet in length. From the east end of the trestle-work on the east side of the river there is a solid earthen embankment for about one thousand feet, at which point there is another open trestle-work seventy-five feet in length and fifteen feet high. The plaintiff's farm is on the north side of the railroad, and its west line is about one hundred and fifty yards east of the river and seventy-five yards from the east trestle approach to the bridge. It appears that the low bottom-lands adjoining the river were subject to overflow to some extent at times of high water, before the railroad track was constructed. The evidence shows quite satisfactorily that, by reason of the obstruction caused by the railroad, in times of freshets in the river the overflow water is from two to four feet higher on plaintiff's land on the north side of the railroad than it is on the south side. We think no other reasonable conclusion can be drawn from the evidence in the case. The plaintiff does not complain of the road as it is at present, notwithstanding it raises the water higher on his land than it would be if the railroad had not been constructed. His complaint is based upon the fact that the defendant is

about to close up the trestle-work at each end of the bridge by solid earthen embankments, and that, if it should be permitted to do so, the flow of water will be so obstructed in times of freshet in the river that it will be raised much higher, and inundate more of his land, and remain upon the land for a longer time than it otherwise would. We think this proposition is sustained by the evidence. Indeed, it appears to us to be a logical conclusion from the practically undisputed fact that, as the road, as it now is, with some eight hundred feet of open trestle approaches to the bridge, obstructs the flow of water, the obstruction must be increased by substituting solid earthen embankments in place of the trestle-work. It appears that the wooden bridge first constructed was destroyed by fire, and that another was built, which was also destroyed in the same way; and that part of the trestle-work was at one time burned. The defendant, to the end that its road might be more permanent and safe, built stone abutments and an iron bridge, and proposed to make solid embankments in place of the trestle-work. It does not appear, however, that it was proposed to make an embankment in place of the seventy-five feet of trestle-work on the low-land east of the bridge, and not a part of the approach to the bridge. The new bridge is about forty feet longer than the old one and the defendant proposes to widen the banks of the river from one stone abutment to the other, and cut down the surface, so that the water will have a free and unobstructed flow between the abutments; and it is claimed that when this is done the plaintiff will have no just ground of complaint. We do not think this claim is supported by the evidence. We believe it to be fairly established by the proofs in the case that there will be additional overflow, to the injury and damage of the plaintiff, if the defendant is permitted to make earthen embankments across the low-land, and that such damage will not be averted by the new bridge and cutting away the banks of the stream.

II. It is insisted, however, that the plaintiff has no right to maintain the action, because the water which

1. WATER and watercourses: obstruction by railroad: surface water.

overflows his land is mere surface water. It appears from the evidence that the West Nodaway river is a natural watercourse, with well-defined banks, and has its source some forty or fifty miles north of the railroad crossing. There are low bottom-lands along the river throughout its whole course. In times of high water, which occurs sometimes once or twice a year, and at other times not so frequently, it overflows its banks, and the current of the stream is widened to the full width of the water. Before the railroad was built, the plaintiff's farm was to some extent subject to this overflow, but very much less than since the road was built. There has been much discussion, and many cases have been determined by the courts, upon the question as to the rights of the parties suffering injuries by the inundation of land by water. A distinction is made as to surface water and the water of natural streams. Under the evidence in this case, we do not regard it as our duty to enter upon a discussion of these questions. The case of *Sullens v. Chicago, R. I. & P. Ry. Co.*, 74 Iowa, 659, so far as it involves the question, is precisely like the case at bar; and it was held that the defendant was liable in damages. It is sufficient to refer to that case. We are content with the conclusion reached therein, and with the reasoning upon which it is based.

III. The defendant, by its answer, averred that it is a solvent corporation, able and willing to pay all just

2. ——: obstruction: nuisance: injunction: remedy at law.

demands against it, and that the plaintiff has no right to an injunction, because he has a plain, speedy and adequate remedy at law for all damages he may sustain by reason of the proposed improvement of plaintiff's railroad. It is claimed that, as the plaintiff neither alleged nor proved the insolvency of the defendant, the petition should have been dismissed. The rule contended for by counsel has no application to an action in equity to enjoin the erection or abatement of a nuisance. The obstruction of the flow of a stream, by which lands are inundated, is a nuisance, and courts of equity may by

injunction abate[illegible] enjoin the same, without averring and proving the insolvency of the defendant. See *Bushnell v. Robeson*, 62 Iowa, 540. AFFIRMED.

BARNES BROS. v. MCCREA & CO. *et al.*

Sale: OF GRAIN TO ELEVATOR: WHAT CONSTITUTES: BAILMENT DISTINGUISHED. Plaintiffs delivered oats to H., who operated an elevator, under an alleged oral agreement that they were to remain in the elevator until plaintiffs were ready to sell them, and that H. was then to have them if he would pay as much as was paid by others; and in case he did not buy, he was to have one cent per bushel for weighing them in and out. Plaintiffs knew that the oats so delivered were mixed in a mass with others, and that H. was accustomed to ship from the mass whenever the prices suited him; and they could not have entertained the thought that the identical oats were in any case to be returned to them. *Held* that the true meaning of the contract was that H. was to have the option to pay the best market price for the oats whenever plaintiffs desired to close the transaction, or to return to them an equal quantity of similar oats; and that it was a contract of sale and not of bailment. And H. having afterwards mortgaged to defendants all the oats then in the elevator,—including, however, none of the identical oats delivered by plaintiffs,—*held* that plaintiffs could not, as against defendants, set up any claim to the mortgaged oats. (*Johnston v. Browne*, 37 Iowa, 200, *followed*, and *Sexton v. Graham*, 53 Iowa, 181, *distinguished*).

Appeal from Boone District Court.—HON. L. G. KINNE, Judge.

FILED, SEPTEMBER 10, 1888.

ON the eighteenth day of February, 1887, the plaintiffs commenced hauling oats to the elevator of F. C. Huntley, in Ogden, and on the third day of the next March completed the delivery thereat of about fifteen hundred and eighty-six bushels. On the twenty-fourth day of June, 1887, Huntley failed, and defendants took possession of all the oats in his elevator, amounting to about two thousand bushels. Possession was so taken under a chattel mortgage executed by Huntley on the second day of October, 1886. The plaintiffs allege that at the time of the failure they were the owners of the oats, and that defendants have taken and converted

them to their own use. After the evidence had been introduced, defendants moved the court to instruct the jury to return a verdict for them. The motion was sustained, and a verdict and judgment were rendered accordingly. The plaintiffs appeal.

Clayton Harrington and *E. L. Green*, for appellants.

Crooks & Jordan, for appellees.

ROBINSON, J.—The motion to instruct the jury for the defendants was based upon the grounds that the agreement between plaintiffs and Huntley, under which the oats were delivered in the elevator, was in legal effect a sale, and not a bailment, and that none of the oats so delivered by plaintiffs were among those taken by defendants. The evidence shows that at the time in question Huntley was engaged in the business of buying, shipping and selling grain for himself, and in storing grain in his elevator for others. This elevator contained fifteen bins, in which grain he purchased and grain stored was placed indiscriminately, and mixed. When plaintiffs delivered their oats, a large amount was being received by Huntley, and all were mixed together in various bins, without regard to ownership, and plaintiffs knew that fact. They also knew that Huntley was shipping to Chicago, and selling when he could obtain satisfactory prices, and that such had been his custom for years. The only oats taken by defendants were the contents of a bin which was filled in the fall of 1886, and had not been disturbed, and a few hundred bushels purchased by Huntley after the third day of March, 1887, and a few days before the failure. None of the oats actually delivered by plaintiffs, and none of the oats with which theirs had been mixed, were taken by defendants. No warehouse receipt was taken by plaintiffs, and no writing was delivered to them, excepting a memorandum of the number of bushels and pounds of oats hauled and the dates of delivery. The appellants claim that their oats were delivered under a verbal

agreement that they were to stay in the elevator until plaintiffs were ready to sell them. Huntley was then to have them, if he would pay as much as was paid by other parties in Ogden or Berkley, and in case he did not buy, he was to receive one cent per bushel for weighing the oats in and out. The statements of plaintiffs in regard to the contract must be taken and construed in connection with admitted and known facts. When so considered, it is evident that plaintiffs could not have understood that the identical grain which they delivered was to be retained in the elevator, and returned to them if not purchased by Huntley. They knew that to be impossible, because they saw it mixed with other grain, from day to day, as it was delivered. They could not have understood that the mass with which their oats were mixed was to be retained in the elevator until they should sell or receive therefrom the number of bushels they delivered, for the reason that they knew that Huntley shipped and sold from this mass from time to time, as the prices suited him. The only conclusion which can properly be drawn from the evidence is that the oats were delivered to Huntley under an agreement by which he could elect to return to plaintiffs an equal quantity of oats, when they desired to close the transaction, or in lieu thereof to pay to them the highest market price for the same in Ogden or Berkley. The right to make the election was vested in Huntley alone. Plaintiffs could not withdraw any oats, unless Huntley refused to pay for them the highest market price in the places named. These facts bring the case within the rule announced in *Johnston v. Browne*, 37 Iowa, 200. But it is said that the decision in that case is in conflict with the later one in *Sexton v. Graham*, 53 Iowa, 181. In the last-named case it was said "that where a warehouseman merely receives grain from several depositors, with the understanding that it may be mixed in a common mass, and it is so mixed, the transaction is a bailment, and the depositors are tenants in common." And that doctrine seems to be sustained by the authorities. The majority opinion goes further, and holds, in effect, that

the common mass from which each owner is entitled to draw need not contain any of the grain which constituted the original mass. This seems to have been based, in part at least, upon the thought that the warehouse receipt attaches to each new deposit, and that the receipt holder becomes and remains at all times a tenant in common of the mass which is being increased or diminished. The opinion was the result of the conclusion of the majority that the original transaction between Sexton & Abbott and Graham was one of bailment, and that, while the entire contents of the warehouse were changed several times, yet that the amount of grain in store, at any given time, was neither greater nor less by reason of the change; and, further, that by reason of the plan of handling the grain, all which the warehouse contained at any time was to be considered the common mass from which each depositor was entitled to draw. In other words, the majority opinion rests upon the conclusion of those who concurred in it, that the grain in question was deposited under a contract of bailment, and that nothing afterwards transpired to change the contract, nor to change the relation of the depositors to the contents of the warehouse. If the conclusions are correct, the decision was justified. But in our opinion the contract in this case was not one of bailment, but of sale. This necessarily results from the fact that plaintiffs delivered the grain with knowledge that it was being mixed with other grain which was being shipped by Huntley, and from the further fact that Huntley had the right to retain the grain on paying for it the highest market price in the two places designated. The facts show that the contract must have been made with reference to Huntley's known course of dealing. *Hughes v. Stanley*, 45 Iowa, 625. In case grain was returned to plaintiffs, they were to pay Huntley for weighing in and out, but nothing for storage. It was said, in *Norton v. Woodruff*, 2 N. Y. 156, that "the distinction between an obligation to restore the specific thing received, or of returning others of equal value, is the distinction between a bailment and a debt, so recognized by the decisions in England and this state, with the exception

of *Seymour v. Brown*, 19 Johns. 44," and that "the decision in *Seymour v. Brown* has been overruled in the same court in which it was pronounced, and cannot, we think, be sustained upon principle or authority." The case of *Norton v. Woodruff* was approved in *Johnston v. Browne*. The principle therein announced is sustained by numerous decisions. *Wilson v. Cooper*, 10 Iowa, 566; *Seymour v. Wyckoff*, 10 N. Y. 216; 2 Kent Comm. 589; *Chase v. Washburn*, 1 Ohio St. 244; *Hurd v. West*, 7 Cow. 752; *Ewing v. French*, 1 Blackf. 354; *Lonergan v. Stewart*, 55 Ill. 45; *Butterfield v. Lathrop*, 71 Pa. St. 226; *Rahilly v. Wilson*, 3 Dill. 420. We are satisfied with the doctrine of *Johnston v. Browne*, and think it controls in this case. The judgment of the district court is therefore

AFFIRMED.

SUPERVISORS MITCHELL COUNTY v. HORTON *et al.*

1. **Board of Supervisors:** SPECIAL MEETINGS: NOTICE: WHAT SUFFICIENT. Under section 301 of the Code, six days' notice to each member of the board of supervisors of a special meeting of the board is not required where the notice is personally served, but only in cases where it is served by leaving it at his place of residence; nor is it necessary that one week's notice of such meeting be given to the public when it is given by publication in a newspaper, but only when it is given by posting. And in this case, where personal notice of the special meeting was served on the supervisors four days prior to the meeting, and general notice was given by five days' prior publication in a newspaper, *held* that it was sufficient to make the special meeting valid.

2. ———: ———: VALIDITY: ESTOPPEL OF MEMBERS AND OTHERS. Where certain members of the board of supervisors had notice of a special meeting, and were present thereat, and protested against the validity of the meeting on the ground that the notice was insufficient, but they afterwards participated in the business transacted thereat, which was the revocation of an order made at a former meeting whereby a certain bridge was to be constructed, and the protesting members had been appointed a committee to contract for its construction, *held* that such members were afterwards estopped from questioning the validity of the revoking order on the ground of the insufficiency of the notice of the special meeting. Also, that one who knew of all these facts could not afterwards make a legal contract with the protesting members for the construction of the bridge.

3. ——— : ——— : NOTICE : PUBLICATION. A notice of a special meeting of the board of supervisors was published on slips of paper which contained nothing else except the name of the newspaper in which they were folded, with the word "Supplement" added; and the validity of the publication was objected to on the ground that the "supplement" was not sent to all the subscribers. But as there was nothing to justify the conclusion that the omission to send the "supplement" to each subscriber was other than accidental, nor that any considerable number of subscribers were affected by it, *held* that the objection was not well grounded; the rule being that if the paper is published and distributed in the usual manner, without intent to suppress any copies, it is sufficient.

4. ——— : ——— : POWER TO RESCIND FORMER ACTION. The board of supervisors at a regular meeting ordered the construction of a bridge and appointed a committee to contract therefor. Before any contract had been made the board, at a special meeting, reconsidered and rescinded their action in regard to the bridge. *Held* that it had power so to do, and that the members who had been appointed as the committee could not complain that they were thereby deprived of the right to contract for the construction of the bridge.

5. ——— : ——— : WHAT MAY BE DONE. There is no reason why business imposed upon the board of supervisors may not be transacted as properly at a special as at a regular meeting, if it be specified in the request for and notice of the meeting; excepting in cases where, from the nature of the business, or the provisions of the law in regard to it, the purpose or policy of the law, or the rights of others, require, that it be done at a regular meeting.

Appeal from Mitchell District Court.—HON. J. B. CLELAND, Judge.

FILED, SEPTEMBER 10, 1888.

THE petition of plaintiffs shows that during the year 1886 the board of supervisors of Mitchell county was composed of J. H. Ayers, chairman, Harry Counsell, William Penney, and defendants A. T. Tollefson and E. C. Lubiens; that at its January, 1886, session, said board appointed a committee, consisting of Ayers, Tollefson and Lubiens, to examine two bridge-sites on the Cedar river, called, respectively, "Hansen's Ford" and "McCarthy's Mill," and make construction estimates, and report at the next session of the board; that further time was given said committee at the April session, and that at the June, 1886, session a majority

of the committee reported in favor of building a bridge at Hansen's Ford, and that an appropriation of ten thousand dollars be made for that purpose; that said report was adopted by a majority vote, and that Penney, Tollefson and Lubiens were appointed a committee to let the contract and superintend the erection of a bridge at Hansen's Ford; that on the sixth day of July, 1886, a special meeting of the board of supervisors was held, and the action had at the June meeting, which adopted the report of the committee first appointed, and appointed another committee to let the contract for and superintend the construction of the bridge, was reconsidered, and the special committee last named was discharged; that defendant Horton was present at the special session of the board, and had actual and full knowledge of the action taken; that on the third day of September, 1886, defendants Tollefson and Lubiens entered into a contract with defendant Horton to construct a bridge at Hansen's Ford, upon a public highway, for the sum of $9,785; that defendants pretended to make said contract by virtue of the action of plaintiffs taken at the June, 1886, meeting; that afterwards, at its regular September session, but before work had been commenced under said contract, plaintiff ratified the action taken at its special session in July, and disclaimed and repudiated as without authority any act done or contract made by Tollefson and Lubiens, and immediately notified Horton of such action; that Horton threatens to erect a bridge at said ford in a public highway, and has commenced the same, and, if permitted to continue, will greatly obstruct the highway, and hinder and impede travel thereon. Plaintiff asks that the pretended contract be declared void, and that defendants be enjoined from proceeding thereunder, and from obstructing said highway by drawing materials thereon. Copies of the report of the committee, and the proceedings of the plaintiff, are incorporated in the petition. The answer of defendants admits all the proceedings and actions alleged to have been had prior

to the July session. It also admits that all the members of the board were present at that session, and participated in the proceedings, but it alleges that Tollefson and Lubiens verbally protested against doing or attempting to do any business on the ground that lawful notice of the meeting had not been given. It avers that the July session was illegal, and the acts attempted to be done thereat void, because of insufficient notice; that the only personal notice of that meeting given to the members of the board was served on the second day of July, 1886, and that the only notice of said meeting by publication was given by printing the notice on small slips of paper, which contained nothing else excepting the title "Mitchell County Press Supplement," and inclosing such slips within and attaching them to a portion of the issue of the Mitchell County Press, a weekly newspaper printed and generally circulated in Mitchell county; that the slips were not sent to all the subscribers of said paper then residing and paying taxes in said county, and were inserted in the issue dated July 1, 1886, but circulated the next day. The answer also admits that Horton knew of the proceedings of the July session at that time, and that they have made a contract, as alleged, for the construction of a bridge, to be paid for by Mitchell county. Commencement of work by Horton is also admitted. A copy of the agreement, and also of the request for a special session of the board, with the notice given by the county auditor, and proof of service, are incorporated in the answer. An amendment to the answer alleges that the July meeting was not authorized by law, and that all proceedings of plaintiff had at that time were unauthorized and void. The plaintiff demurred to the amended answer, on the ground that the facts therein alleged do not constitute a defense, nor entitle the defendants to the relief demanded. The demurrer was sustained, and, defendants refusing to further plead, a decree was rendered for plaintiff as prayed. Defendants appeal.

J. F. Clyde and *A. L. Gove*, for appellants.

M. M. Browne, for appellee.

ROBINSON, J.—I. The chief question presented for our determination is the sufficiency of the notice given of the special July session of the board of supervisors. This involves a consideration of section 301 of the Code, which is as follows: "Special meetings of the board of supervisors shall be held only when requested by a majority of the board, which request shall be in writing, addressed to the county auditor, and shall specify the object for which such special meeting is desired. The auditor shall thereupon fix a day for such meeting, not later than ten days from the day of the filing of the petition with him, and shall immediately give notice in writing to each of the supervisors personally, or by leaving a copy thereof at his residence, at least six days before the day set for such meeting. The notice shall state the time and place where the meeting will be held, and the object of it, as stated in the petition, and at such special meeting no business other than that so designated in the petition and notice shall be considered or transacted. The auditor shall also give public notice of the meeting, by publication in not exceeding two newspapers published in the county, or, if there be none, by causing notice of the same to be posted on the front door of the courthouse of the county and in two other places therein, one week before the time set therefor." No objection is made to the sufficiency of the request to the auditor, nor to the contents of the notice given by him. But it is insisted by appellants that before a legal special meeting of the board can be held, six days' notice thereof must be given to each supervisor, and seven days' notice to the public, and that this notice is jurisdictional, and cannot be waived. In this case it is shown that personal notice was given to each supervisor four days before the meeting, and that the notice by publication was given at most but five days before. An examination of the statute will show that the construction claimed for it by appellant could not have been intended by the general assembly, for the reason that it might frequently require an impossibility. It is well

1. BOARD of supervisors: special meetings: notice: what sufficient

known that when the statute was enacted the newspapers of the state were usually published as dailies or weeklies, and that dailies were published in but few counties of the state, and it is well known that this is still the case. There may be but one paper published in a county, or, if more than one, all may have a common publication-day. If, in such a case, there is no daily, and the petition for a special meeting should be filed with the auditor immediately after the publication of the papers, it would be impossible to publish the notice more than three or four days before the meeting, for the time of meeting must be fixed by the auditor on a date not later than ten days from the time of the filing of the petition. Hence we conclude that the notice which must be given one week before the meeting is the one which must be posted in cases where no newspaper is published, and not the one which is given by publication. There seems to be good reason for this difference of time in the two cases, for the purpose of the public notice is to inform the public of the proposed meeting, and this may be much more successfully accomplished by publishing it for a single day in a newspaper than by posting it in the manner required for a week. Our conclusion is further sustained by the fact that section 309 of the Revision of 1860, which corresponds to section 301 of the Code, required the notice to be inserted in a newspaper at least one week before the meeting, by making it the duty of the clerk of the board of supervisors to cause the notice "to be once inserted in the newspapers published in the county, not exceeding two [if there be such], at least one week before such meeting; but if there be no paper published in the county, a notice of such meeting shall be posted at the front door of the courthouse or usual place of meeting; and cause one to be posted in some public place for at least a week." There was no ambiguity in this language, so far as it referred to newspaper publications, and the statute fixed no time within which the meeting should be held. The change made by the Code must have been for a purpose, and we think it was in part to shorten the time of the

newspaper notice. There is nothing in the language of section 301 to require a different construction. Much of what we have said in regard to newspaper publication will apply to the requirements of service on the supervisors. If personal service of the notice cannot be made on the supervisor by reason of his absence from home, it is proper to allow him a longer time in which to receive the notice and prepare for the meeting than is required in case of personal service. The language of the Revision was as follows: "On the reception of such request the clerk shall immediately give notice in writing to each of the supervisors by causing the same to be delivered to such supervisor, or by leaving a copy at his residence at least six days before such meeting." In the Code the words "personally, or" are inserted after the word "supervisors," and the punctuation is so changed as to authorize a different construction. It is evident that the changes of the Code were designed to allow the holding of a special meeting on a shorter notice than was required by the Revision, and it is in harmony with the purposes of these changes to hold that less time is required where each supervisor is personally served with the notice, and when it is published in a newspaper, than where personal service is not had, and newspaper publication is not made.

We are also of the opinion that defendants Tollefsen and Lubiens are estopped from denying the legality of the special meeting. It is true, they protested against it, but their protest showed that they had knowledge of the defects, if any, which existed in the service of notice. After they had protested they participated in the meeting to the end, and strove by so doing to accomplish their purposes. Failing in that, they should not be heard to urge want of due notice in this proceeding. The case of *School Dist. v. Atherton*, 12 Metc, 105, is not in conflict with this view. In that case defendant had offered to the district, at an illegal meeting of the inhabitants, to lease a certain parcel of land. The offer was accepted by the meeting, and, Atherton afterwards

2 —: —: validity: estoppel of members and others.

refusing to carry out his part of the agreement, an action for specific performance was brought. The court held that, as the meeting was illegal, the district was not bound by the action taken, and there was no mutuality in the contract. It further held that the defendant Atherton was not estopped to deny the legality of the meeting from the circumstance that he was present at it, for the reason that he might have supposed that it was legally called, and that he was making a valid contract. Since Tollefson and Lubiens were estopped to deny the legality of the special meeting, Horton, with knowledge of all the facts, could not make a legal contract with them. We conclude that in this case each supervisor had due notice of the meeting in July, and that the time of the newspaper publication was sufficient. This is not in conflict with the opinion in *Scott v. Union Co.*, 63 Iowa, 583. In that case there was no notice to the supervisors, nor to the public. It was an attempt to make a special meeting a part of a regular one.

II. It is urged by appellants that the notice by publication was not sufficient, for the reason that the slips containing it were not sent to all the subscribers of the paper which published it who were taxpayers of the county. It is not claimed that the notice was insufficient because printed on slips in the form of a supplement. It is not shown that the slips were omitted from any fraudulent purpose, nor is the proportion of the subscribers and taxpayers who failed to receive them shown. The number may have been very small. The statute is satisfied if the notice is published in a newspaper. It is not made a condition to a legal meeting that each subscriber receive a copy of the paper containing the notice. While a fraudulent suppression of a part of the issue might, in some cases, render the special meeting invalid, yet it would be unreasonable to hold that the accidental failure to send papers containing the notice to some of the subscribers would prevent the holding of a legal meeting. If the paper is published and distributed in the usual manner, without intent to suppress any copies, we think

8. —: —: notice: publication.

it is sufficient. There is nothing in this case to justify the conclusion that the omission to send the supplement to each subscriber was other than accidental, nor that any considerable number of subscribers were affected by it.

III. It is insisted by appellants that, conceding that the special meeting was legal, yet plaintiff had no power to reconsider at that meeting and rescind the action of the preceding meeting, for the reason that the action which ordered the construction of the bridge, and appointed a committee for that purpose, was judicial in its nature, and could not, therefore, be reviewed at a subsequent meeting. It is true that the determination to build a bridge required the exercise of a discretion. This is true of many duties which boards of supervisors are required to perform, but it does not follow that their action, in such cases, is final. In this case, the action had at the June meeting did not determine conflicting interests, nor create rights which became vested before the special meeting. The members of the committee acquired no special right to contract for and supervise the building of the bridge which they can urge in this case. It was their duty as supervisors to act for the best interests of the people of the county, and they could acquire no rights as supervisors which can defeat the performance of that duty. We see no reason for concluding that the plaintiff lost the right to reconsider its action to build a bridge, by the adjournment of the June meeting. *Pond v. Negus*, 3 Mass. 230; 1 Dill. Mun. Corp, sec. 228.

4. —: —: power to rescind former action.

IV. Appellants next claim that the statute does not authorize boards of supervisors to take action in regard to building bridges at special meetings. Section 303 of the Code provides that "the board of supervisors, at any regular meeting, shall have the following power, to-wit: '(18) To provide for the erection of all bridges which may be necessary, and which the public convenience may require, within their respective counties, and to keep the same in repair.'" It is insisted that because of those

5. —: —: what may be done.

provisions the action taken at the special meeting was void. Even if we were to adopt the strict construction asked by appellant, it would not sustain his claim, for the reason that the board did not attempt to provide for the erection of a bridge at the special meeting, but to prevent it. There seems to be no good reason for holding that boards of supervisors have no power to discharge any of the duties imposed upon them by section 303, excepting at regular meetings. Occasions frequently arise calling for immediate action on the part of the board where delay would result in much loss or inconvenience to the public. The statute does not prescribe the business which may be done at special meetings, excepting that it must be such as was stated in the request for such meeting and in the auditor's notice. There is nothing in the language of section 303 which justifies the conclusion that no business therein authorized can be transacted at a special meeting, while, from the nature of the duties of supervisors, special meetings must be designed largely to meet and provide for unexpected emergencies, or to transact business which for any reason was not attended to at the regular meetings. We know of no reason why business imposed upon the board of supervisors may not be transacted as properly at a special as at a regular meeting, excepting in cases where, from the nature of the business, or the provisions of law in regard to it, the purpose or policy of the law or the rights of others require that it be done at a regular meeting. We conclude that the demurrer was properly sustained. The decree of the district court is therefore

AFFIRMED.

REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA,

AT

DES MOINES, OCTOBER TERM, A. D. 1888,

IN THE FORTY-SECOND YEAR OF THE STATE.

PRESENT:

HON. WILLIAM H. SEEVERS, CHIEF JUSTICE.
HON. JOSEPH R. REED,
HON. JAMES H. ROTHROCK,
HON. JOSEPH M. BECK,
HON. GIFFORD S. ROBINSON, } JUSTICES.

CORBETT v. HUGHES *et al.*

1. **Promissory Note**: PLEA OF PAYMENT: WHAT IS NOT. In an action against the principal maker of a promissory note and his surety, they pleaded as a partial defense that there had been paid on said note by the surety to the plaintiff a certain sum in property, and a certain other sum in labor, but there was no allegation that the plaintiff had agreed to accept these items in part payment of the note. *Held* that the plea was not good as a plea of payment, because the plaintiff was not bound to accept anything but money in payment.

2. ——— : DEFENSE : COUNTER-CLAIM IN FAVOR OF SURETY ALONE. In an action upon contract against several defendants, a cause of action against the plaintiff arising out of matters independent of the contract must be in favor of *all* the defendants, in order to be pleaded as a counter-claim. (Code, sec. 2659, subd. 3). And so, in an action on a promissory note against the principal and surety, a cause of action against the plaintiff and in favor of the surety alone cannot be so pleaded; but in such case, as an exception to the rule, a cause of action in favor of the principal alone may be pleaded. (See *Reeves v. Chambers*, 67 Iowa, 81).

Appeal from Hardin District Court.—HON. JOHN H. HENDERSON, Judge.

FILED, OCTOBER 2, 1888.

ACTION upon a promissory note. The district court, on plaintiff's motion, struck out the second and third divisions of the answer, on the ground that the matters pleaded constituted a counter-claim, and that the same did not arise out of the contract set out in the petition, and constituted a cause of action in favor of defendant Rose alone. The only question arising upon the appeal is as to the correctness of that ruling.

Albrook & Hardin, for appellants.

W. J. Moir, for appellee.

REED, J.—It was alleged in the motion that defendant Hughes is the principal debtor on the note sued on, and that Rose is surety; and counsel for both parties have argued the cause on the assumption that the averment is true. We will consider the case, assuming that such is the relation of the defendants, although the fact is not shown by any averment of the pleadings, neither does it appear upon the face of the note.

I. The second division of the answer is as follows: "By way of counter-claim thereto, these defendants say that there has been paid on the said note to the plaintiff by the defendant Rose the sum of $29.85, in tiling, and the further

1. PROMISSORY note: plea of payment: what is not.

sum of six dollars, in hauling tile for the said plaintiff from Ackley, making a total of $35.85, to which these defendants are entitled as a credit on the said note, an itemized statement of which is hereto attached as Exhibit A, and made a part thereof." In the exhibit the plaintiff is debited with three items for tile and one item for hauling. It was contended that this division of the answer pleaded a partial payment of the note, and that it should not have been stricken out, even though it should be held that a counter-claim in favor of but one of the defendants cannot be pleaded in the action. The promissory note sued on is a contract for the payment of money. That contract would not be performed by the delivery of property or the rendition of services, unless there was an agreement by the payee to accept such property or services in payment. Its delivery and acceptance, in the absence of such agreement, would create an indebtedness against the payee, but would in no manner affect the indebtedness evidenced by the note. The division of the answer in question, while it alleges in effect that Rose rendered the services and delivered the property in payment of the note, does not aver that plaintiff ever agreed to accept it as payment. It is very clear that an allegation to that effect is essential to a plea of payment, for, without such agreement on plaintiff's part, what was done would not amount to a payment, no matter what Rose's purposes or intentions were when he performed the services and delivered the property. Giving full force, then, to all the averments of the division, it amounts simply to an allegation that plaintiff is indebted to Rose for the items charged in the account.

II. The third division of the answer, it is conceded, pleads a counter-claim in favor of Rose alone, growing out of matters entirely independent of the note. The question in the case, then, is whether the principal and surety, when sued jointly on the contract, can avail themselves of an indebtedness thus arising in favor of the surety alone,

2. ——: defense: counter-claim in favor of surety alone.

and have the amount thereof deducted from the indebtness evidenced by the contract. The right to plead a counter-claim in any case is purely statutory. Our statute on the subject is section 2659 of the Code, the third subdivision of which governs the question before us. It is as follows: "Any new matter constituting a cause of action in favor of the defendant, or all of the defendants if more than one, against the plaintiff, or all of the plaintiffs if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held either matured or not, if matured when so plead." There is no room for argument as to the effect of that provision. Under it a cause of action which arises out of matters independent of the contract sued on must be in favor of all of the defendants and against all of the plaintiffs, or the parties must seek their remedy thereon in a separate action. It cannot be pleaded as a counter-claim. True, we held in *Reeves v. Chambers*, 67 Iowa, 81, when a principal and surety were sued jointly on the contract, that they were entitled to plead as a counter-claim a cause of action arising in favor of the principal alone, out of matters independent of the contract sued on. But the grounds of that holding are clearly set forth in the opinion. Under the law the surety has the right to have the property of the principal first appropriated to the satisfaction of the debt, and the courts will enforce that right. The application of the debt due from the plaintiff to the principal to the satisfaction of the secured debt is but a mode of enforcing it. And that right creates in favor of the surety an exception to the rule prescribed by the statute quoted. But when the cause of action is in favor of the surety alone, the case is not within the exception, but is governed by the rule. The judgment will be

AFFIRMED.

THORNTON v. MCCORMICK.

1. **Arbitration and Award:** NOT STATUTORY: GOVERNED BY COMMON LAW. The legality and effect of an award not made in accordance with the provisions of the statute must be determined by the rules relating to awards at common law. 75 285 120 278

2. ———: CONCLUSIVENESS OF AWARD. A common-law award must be held to be conclusive between the parties as to all matters submitted to arbitration, unless a material mistake appears on the face of the award, or unless equitable grounds for setting it aside are shown. And where both parties have agreed to abide by the judgment of the arbitrators as it should appear in the award, neither can afterwards object to the award on account of errors of judgment on the part of the arbitrators.

3. ———: CONSTRUCTION OF AGREEMENT. The agreement for arbitration in this case related to the rights of the parties under a farm lease, which by its terms was to terminate March 1, 1891, but which, by the agreement, was to terminate July 1, 1887. The lease provided that at its termination, at the end of the full term, plaintiff was to leave upon the premises hay, oats, corn, and other articles, equal in quality and amount to that received by him at the beginning of the term; and the agreement for arbitration provided that the rights of the parties to the lease should be the same as though it had terminated regularly. *Held* that the agreement did not contemplate that the place and property should be left July 1, 1887, in the same condition in all respects as the lease required for March 1, 1891, since that was not possible; but only that this provision of the lease should be considered by the arbitrators, and allowance made therefor.

4. ———: SUBMISSION AT COMMON LAW: AWARD AGAINST EVIDENCE: REVIEW. The parties in this case saw fit to submit their claims and differences to a tribunal of their own creation, which they invested with exclusive jurisdiction, free from statutory control, and they made the decision of that tribunal final. *Held* that the award could be set aside only upon equitable grounds, and that the want of sufficient evidence to sustain it was not such ground. Accordingly, where the agreement of arbitration did not require witnesses to be sworn, the fact that the arbitrators gave more credence to the unsworn statements of plaintiff than to writings offered by defendant was no ground for disturbing the award.

5. ———: ASSAILING AWARD AFTER ACCEPTING BENEFITS. One who has accepted the benefits of an award in part cannot be heard to object to its validity.

Appeal from Palo Alto District Court.—HON. GEORGE H. CARR, Judge.

FILED, OCTOBER 2, 1888.

ON the twenty-second day of January, 1886, the defendant leased to plaintiff a farm in Palo Alto county for the term of five years, commencing on the first day of March, 1886, and also a quantity of personal property, consisting in part of agricultural implements, stock, hay and grain. On the seventh day of June, 1887, these parties entered into an agreement, the parts of which material to a determination of this case are as follows: "Whereas controversies exist between us, Charles McCormick and J. R. Thornton, of Palo Alto county, Iowa, in relation to divers matters growing out of, or in some way connected with, the relation of landlord and tenant between us, under a certain agreement of lease dated the twenty-second day of January, A. D. 1886, and which said lease, it is agreed between the parties, shall now terminate and end, and the rights of the parties under said lease shall be the same as provided therein at the regular end or termination thereof: now, therefore, we, the undersigned, Charles McCormick and J. R. Thornton, do hereby agree to submit all and every matter of difference between us, under said contract or otherwise, to Alexander Sims, Thomas Lane and Joseph S. Atkinson, of Palo Alto county, who shall meet at Emmetsburg, at such time and place as they shall select, and who shall arbitrate, award, adjudge and determine such matters as either of us may in writing present to said arbitrators for their consideration, with power to said arbitrators to call in and examine witnesses on such points as they may think necessary, and award the costs of same to the party calling such witnesses; and each party must present all matters which he has against the other to the said arbitrators in writing, or be forever barred and estopped from making any further or other claim; and said arbitrators shall make their report, specifying the items allowed to each, and the items

claimed by each, respectively, which are rejected, and, after offsetting the claims allowed to the one against the other, shall award to that one in whose favor the balance is found such sum as they shall find and determine to be his due against the other, to be paid and payable within sixty days from the time said arbitrators shall make their award; and said arbitrators shall also by their said award fix and determine the time at which possession of said farm and property shall be given to the said Charles McCormick; and such award shall be made in duplicate, and one copy delivered to each of the undersigned. * * * And the undersigned do mutually covenant and agree to and with each other that the award to be made by the arbitrators, or by any two of them, shall, in all things, by us and each of us and our personal representatives, be well and faithfully kept, observed and performed, provided that such award be made in writing, under the hands of said arbitrators, or any two of them, and be delivered to us personally, or forwarded to us by mail, on or before the thirtieth day of June, 1887." The arbitrators rendered their award in writing on the twenty-first day of June, 1887, and thereby determined that defendant should pay to plaintiff $149.47, and that certain stock and poultry should be divided according to a plan therein specified. It appears that the property was divided according to the award. This action is brought to recover the amount of recovery named in the award, and eight dollars, alleged to be due the plaintiff in a division of cattle, made pursuant to the award. The defendant set up an equitable defense in his answer, and asks that the award be set aside, and that the court examine the claims and demands of the parties, and make such settlement as shall be equitable, and render judgment accordingly. A demurrer to the answer was sustained. The defendant electing to stand on his answer, judgment was rendered in favor of plaintiff for $151.50 and costs. Defendant appeals.

Soper & Allen, for appellant.

Clarke & Call, for appellee.

ROBINSON, J.—The agreement to arbitrate in terms provided for the settlement of all matters of difference between the parties, but did not authorize the enforcement of the award, which should be made by the judgment of a court. The award in question was not made in accordance with the provisions of the statute relating to arbitration, and is not, therefore, governed by them, but its legality and effect must be determined by the rules relating to awards at common law. *McKinnis v. Freeman*, 38 Iowa, 366; *Burroughs v. David*, 7 Iowa, 159.

1. ARBITRATION and award: not statutory: governed by common law.

I. It is insisted by appellant "that the proceedings of said arbitrators were unfair, unjust and illegal, in this, that they ignored all matters, contracts, and written evidences of debt, and payment which was made by this defendant, and upon which he relied, both to substantiate his claims, and defend himself against the claims of this plaintiff, and accepted as true the loose, verbal statements of the plaintiff with regard to the matters in controversy, and did not require him to substantiate the same by his oath or otherwise; no witness having been examined under oath. That his statements taken and received by said arbitrators as aforesaid were in many particulars incorrect, false,—willfully so,—and that said arbitrators, with more credulity than judgment, made up the base of their findings thereon. That the same are full of mistakes and inaccuracies." We understand the rule to be that an award of this kind will not be set aside for error in the judgment of the arbitrators, nor for a mistake which would not have had any material influence on the arbitrators in reaching their conclusions. To justify the interference of a court, there must be a showing of fraud, corruption, partiality, or misconduct on the part of the arbitrators, or some fraud on the part of the party relying upon the award, or a material mistake which entered into it. *Burroughs v. David*, 7 Iowa, 159; *Boston Water-Power Co. v. Gray*,

2. —: conclusiveness of award.

6 Metc. 165; *Alken v. Bolan*, 1 Brev. 239: *Bumpass v. Webb*, 4 Port. [Ala.] 65. Some cases hold that, when the law and the facts are left to the decision of the arbitrators, their award will not be set aside for a mistake, unless it is shown on the face of the award. *Jones v. Boston Mill Corp.*, 6 Pick. 156; *Boston Water-Power Co. v. Gray*, *supra*; 6 Wait, Act. & Def. 530; *Pleasants v. Ross*, 1 Wash. [Va.] 156; *Jocelyn v. Donnel*, Peck [Tenn.] 274. We are of the opinion that a common-law award must be held to be conclusive between the parties as to all matters submitted to arbitration, unless a material mistake appear upon the face of the award, or unless equitable grounds for setting it aside are shown. When an award is questioned on equitable grounds the pleading attacking it should allege facts, as distinguished from legal conclusions, which show that it should be set aside. In this case the answer charges mistake and wrongful conduct on the part of the arbitrators, and many alleged errors are set out. In reviewing the decision of the court below, we must consider the pleadings as a whole; and we find that many of the matters of which appellant complains are at most but errors of judgment. Both parties agreed to abide by the judgment of the arbitrators as it should appear in the award. Neither can now be heard to complain because it is not what he had hoped it would be.

II. Appellant places special stress upon the facts that the lease provided that at its termination at the end of the full term plaintiff was to leave upon the premises hay, oats, corn, and other articles, equal in quality and amount to that received by him at the beginning of the term; and the agreement for arbitration provided that the rights of the parties to the lease should be the same as though it had terminated regularly; that the value of property equal in quality and amount to that received by plaintiff was, on the first day of July, 1887, the date fixed by the arbitrators for the surrender of the farm

3. ——: construction of agreement.

and other property, equal to $429.52, yet the arbitrators divided it between the parties, allowing defendant but $199.15 therefor. It is evident that the agreement for arbitration did not contemplate that the place and property should be left on the first day of July, 1887, in all respects as the lease required for the first day of March, 1891. That was not possible; but we think the clause of the agreement referred to was designed to require that the obligations created by the lease should be considered in connection with other matters of difference between the parties, and that allowance therefor should be made. The amount of property of the kind which was left on the farm was not equal in quantity to that received by plaintiff, and a money allowance was therefore necessarily made. The answer charges, in effect, that this allowance was not large enough. Whether it was or not depends upon the evidence. That is not before us, and could not be weighed if it were. *Jocelyn v. Donnel, supra; Bumpass v. Webb, supra.*

III. Appellant claims that the arbitrators ignored all written contracts and written evidences of debt and payment held by him, and accepted in lieu thereof the unsworn statements of plaintiff. The agreement of arbitration did not require that witnesses be sworn. The contracts and evidences of debt and payment referred to are not specified, hence we cannot determine whether or not it was error to reject them. But taking the statements of the answer together, it appears that what the arbitrators did was to give more credence to the oral and unsworn statements of plaintiff than to writings offered by defendant. This was certainly within the power of the arbitrators, so far as the answer shows, and their action was final. The answer is chiefly in the nature of an application for a new trial, based upon alleged insufficiency of the evidence to support the award. But the parties saw proper to submit their claims and differences to a tribunal of their own creation, which they invested with exclusive jurisdiction,

4. —: submission at common law: award against evidence: review.

free from statutory control. They made the decision of that tribunal final, in the absence of equitable grounds for setting it aside, and a lack of evidence is not one of these.

IV. Another objection to granting appellant the relief he demands is that he has accepted the provisions of the award in part. The pleadings show that the farm has been surrendered, and the stock divided. So far as shown, the defendant has accepted all the benefits given to him by the award. Having done this, he cannot be heard to say that it is illegal. See *County of Buena Vista v. Iowa Falls & S. C. Ry. Co.*, 55 Iowa, 160, and cases therein cited. The award was an entirety. We conclude that appellant has failed to show any sufficient ground for setting aside the award. The judgment of the district court is therefore

5. — : assailing award after accepting benefits.

AFFIRMED.

FOSTER *et al.* v. HINSEN *et al.*

1. **Practice**: EVIDENCE: FACTS KNOWN TO JUDGE. It would *seem* that in passing upon a motion to strike a bill of exceptions from the files, the court may consider facts known to himself and stated at the hearing, as well as affidavits filed in the case. 75 291 122 10

2. ——— : FILING PAPERS: WHAT ESSENTIAL. Where a bill of exceptions was left with the judge to be corrected, signed and filed by him, and he handed it to the clerk to be filed, *held* that it was filed in contemplation of law, even though the clerk failed to indorse it as filed and to make a note of it in the appearance docket. (Compare *Royer v. Foster*, 62 Iowa, 321, and *State v. Briggs*, 68 Iowa, 416).

Appeal from Des Moines District Court.—HON. CHARLES H. PHELPS, Judge.

FILED, OCTOBER 2, 1888.

APPEAL from an order of the court overruling a motion filed by the plaintiffs to strike a bill of exceptions from the files.

John C. Power, for appellants.

C. L. Poor, for appellees.

SEEVERS, C. J.—The facts are that on the eighteenth day of March, 1887, the court made certain rulings, to which defendants orally excepted. Counsel for the plaintiffs had knowledge of such exception. The bill of exceptions was afterwards prepared and submitted to counsel for the plaintiffs, who made some objections to the bill, and, after hearing counsel on both sides in relation thereto, the judge took the paper, and said he would make such alterations as he thought right, sign, and have it filed. The judge did sign the bill of exceptions within thirty days afterwards, and handed it to the clerk. It was not then marked "Filed" by the clerk. Afterwards the bill of exceptions, and other papers in the case, were taken from the clerk's office for the purpose of preparing an abstract for an appeal to this court. Afterwards counsel for the appellants made application to counsel for the defendants for said papers, for the purpose of preparing an additional abstract, and the same, with exception of this particular bill of exceptions, were handed to him. There was no design in this, but the bill of exceptions was not so delivered by mistake. It was then discovered that it had not been marked "Filed." This was in September, 1887. Counsel for appellants made inquiry at the clerk's office for the bill of exceptions, and was unable to find it; nor was he able to obtain any knowledge that it had ever been signed by the judge; and it is a fact that he did not know that it had been so signed. Afterwards the bill of exceptions was taken to the clerk's office by counsel for the defendants, and the same was marked "filed" by the clerk as of the date of April 9, 1887, and a proper entry of such filing made on the appearance docket, and certain other entries made therein, or entries that had been made changed so as to make the same consistent with the one in relation to filing the bill of exceptions. The appellants made a motion to strike such bill from the files,

which was overruled, and the judge stated in the order overruling the motion that he did so upon facts "made to appear, as well by the statement of the judge on the hearing of the motion as by affidavits on file."

We are required to determine whether the court erred in overruling the motion. The facts known to the judge, and upon which he based, in part at least, his ruling, are not contained in the record, and that such knowledge might possibly have an important bearing on the question to be determined it may be readily conceived. Error must affirmatively appear, and it may be that it was incumbent on the appellants to have embodied in the record the statement of the judge made at the hearing. But waiving this question, for the reason that it is not expressly and in words made by counsel for the defendants, we are required, we think, to presume that the judge left the bill of exceptions with the clerk, to be filed by him, and kept in his office as a paper or record in the case to which it belonged. It was not essential, nor is it required, that such a paper should be entered in or a note made of it in the appearance docket. *Royer v. Foster*, 62 Iowa, 321. As the bill of exceptions was placed in the clerk's office, to be filed and kept therein, it was filed as contemplated in the statute. Code, sec. 2831. The failure of the clerk to properly indorse the fact that it had been filed, on the bill of exceptions, should not prejudice the defendants. Nor was it essential that it should be so indorsed. Such an indorsement is mere evidence of the filing. See *State v. Briggs*, 68 Iowa, 416. The subsequent removal from the clerk's office for a proper purpose is immaterial. The order of the district court must be

1. PRACTICE: evidence: facts known to judge.

2. ——: filing papers: what essential.

AFFIRMED.

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REIZENSTEIN V. MARQUARDT.

Statute of Limitations: ACTION ON BAILMENT: WHEN IT BEGINS TO RUN. The statute of limitations will not begin to run in favor of a bailee until he denies the bailment and converts the property to his own use. Accordingly, in this case, where plaintiff deposited with defendant a watch to be repaired and for safe-keeping, and did not demand it for a period of ten years, when defendant refused to deliver it, *held* that an action for its conversion might be brought at any time within five years from the date of such demand and refusal.

Appeal from Johnson District Court.—HON. H. S. FAIRALL, Judge.

FILED, OCTOBER 2, 1888.

THE plaintiff brought this action to recover the value of a gold watch, of which he claimed to be the owner, and which he alleged the defendant converted to his own use. A motion for a more specific statement of the cause of action was filed, whereupon plaintiff filed an amendment to the petition. A demurrer to the petition, as amended, was filed, and, pending the decision of the demurrer, the plaintiff again, by leave of the court, amended his petition. The defendant again demurred to the petition as amended. The demurrer was sustained. The plaintiff elected to stand upon his petition as amended, and judgment was rendered against him for costs. He appeals.

Ranck & Wade, for appellant.

Robinson & Patterson, for appellee.

ROTHROCK, J.—As the cause was determined upon a demurrer, it is necessary to set out the material facts as they appear in the petition, and the amendments thereto. They are in substance as follows: By the original petition and the first amendment it was averred that in

the year 1877 the plaintiff delivered the watch in question to the defendant for repair and safe-keeping; and that he demanded the same of the defendant about March, 1887; and that defendant gave an evasive answer to the demand; and that a formal demand was afterwards made, and defendant failed and refused to deliver the watch. By the second amendment it was averred that said watch was delivered to the defendant for repairs; that after the repairs were made, and in the same year, at the suggestion of the defendant, the watch was left in his possession for safe-keeping; that the parties afterwards had a number of conversations about the watch, in which defendant proposed to purchase the same, but plaintiff refused to sell; that these conversations occurred about every year, or oftener; that no demand was made until about 1887, and that the defendant at no time refused to deliver the watch to plaintiff until that time; that when the demand was made defendant delivered to plaintiff a lady's watch, which was deposited with defendant by plaintiff at the same time, and under the same contract as the watch for the conversion of which this action was brought; that, at the time the watch in question was delivered to the defendant, the parties were intimate friends and neighbors, and that the plaintiff allowed the watch to remain in the possession of defendant because of said intimate friendship, and by reason of the confidence placed in him as a friend and neighbor. The demurrer to the petition was on the ground of the statute of limitations. The action was commenced on the twenty-fifth day of October, 1887, and actions of this kind are barred in five years from the time the cause of action accrues. Code, sec. 2529, subd. 4.

It is claimed in behalf of the appellee that the statute commenced to run at the time the deposit was made, and that, a demand of the watch not having been made within five years from the deposit, the action is barred. In other words, the claim is that no action can be maintained because demand was not made within five years after the inception of the relation of bailor and bailee

between the parties. It is a general rule that a party cannot prevent the running of the statute of limitations by omitting to do some act which he might have done, or which he is required by law to do. A party, having a claim for money against a county, cannot extend the time for commencing the action by failing to present his claim to the board of supervisors. *Baker v. Johnson County*, 33 Iowa, 155. The same rule applies to promissory notes payable on demand. And, generally, where a right of action depends upon a demand, such demand must be made within the period prescribed by the statute of limitations. *Ball v. Keokuk & N. W. Ry. Co.*, 62 Iowa, 753. This is the rule as to actions arising upon contracts, express or implied. See *Thrall v. Mead's Est.*, 40 Vt. 540; *Codman v. Rogers*, 10 Pick. 112; *Palmer v. Palmer*, 36 Mich. 488; *Jameson v. Jameson*, 72 Mo. 640. In *Codman v. Rogers* it is held that the statute will not begin to run until demand, yet, unless demand be made in a reasonable time, the plaintiff will not be entitled to relief; and a reasonable period of time is determined by the circumstances; and where no cause for delay is shown, the time is to be fixed by the statute of limitations. But the action in this case is in the nature of an action for a tort. It is not grounded upon an agreement to pay money for the watch on demand for the money. The defendant was engaged in the business of a jeweler and repairer of watches. It is alleged in the petition that the watch is very valuable, and worth some three hundred and twenty-five dollars, and that after it was repaired it was left with defendant for safe-keeping. It was not contemplated by the parties that a demand would be made immediately. If such had been the intention, it would not have been deposited for safe-keeping. No right of action accrued until there was a wrongful conversion of the property. The rights and obligations of a bailee of personal property are very much like those of a trustee of a resulting trust in realty, and it has always been held that the statute of limitations commences to run in favor of a trustee from the time when he denies the trust, and claims the trust property

as his own. *Peters v. Jones*, 35 Iowa, 512; *Gebhart v. Sattler*, 40 Iowa, 152. Upon the same principle the statute of limitations will not begin to run in favor of a bailee until he denies the bailment and converts the property to his own use. And the refusal to deliver the property on demand is a conversion. In our opinion, the demurrer to the petition should have been overruled.

REVERSED.

BALDWIN v. THE ST. LOUIS, KEOKUK & NORTHWESTERN RAILWAY COMPANY.

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1. **Practice:** TRIAL NOTICES: RULE OF COURT: CONSTRUCTION: REVIEW. A rule of the district court provided for making orders during the term for the service of trial notices ten days prior to such date as the court might name; and that court, in construing the rule, held that it authorized an order for the service of a trial notice in a special case. *Held* that this was a reasonable construction of the rule; but that if it were doubtful, admitting of an honest difference of opinion, this court would not interfere with that court's construction of its own rule.

2. **Master and Servant:** NEGLIGENCE OF VICE-PRINCIPAL: LIABILITY. One who has charge of the timber-yard of a railroad company, and employs and discharges men, is a vice-principal; and one who takes his place when absent is a temporary vice-principal; and for the negligence of such persons, resulting in personal injury to a subordinate employe, the company is liable.

3. ———: NEGLIGENCE: NOTICE TO VICE-PRINCIPAL. In such case, notice to the temporary vice-principal, when he was acting as such, of the defective piling of timbers which caused the injury, was notice to the company, regardless of the question whether or not he had any duty to perform in the piling of the timbers, or in connection with the piles.

4. **Practice:** EXAMINATION OF WITNESSES: CONTROL OF COUNSEL. A witness was asked on cross-examination, in language hardly proper, whether his testimony was not false, which question he resented. Another question of like import was then asked, to which an objection was sustained. *Held* that the court properly stopped the course of the examination; because, while witnesses may be so interrogated as to test their truthfulness, this should be done in such a manner that unseemly scenes between them and counsel may be avoided.

Appeal from Lee District Court.—HON. J. M. CASEY, Judge.

FILED, OCTOBER 2, 1888.

ACTION to recover damages for personal injuries sustained by plaintiff while in the employ of defendant, through its negligence. There was a judgment on a verdict for plaintiff. Defendant appeals.

J. H. Anderson and *H. H. Trimble*, for appellant.

Gibson Brown and *D. F. Miller, Jr.*, for appellee.

BECK, J.—I. This is the fourth appeal to this court in this case. See 63 Iowa, 210; 68 Iowa, 37; 72 Iowa, 45. The pleadings and evidence found in the abstract before us upon this appeal are substantially the same as those in the former appeals, and are stated in the opinions announcing our former decisions, so far as was deemed necessary. In one or two instances it is claimed that the evidence upon the last trial is to some extent different from the evidence on the former trials. If it be found in the consideration of the case in this opinion that these differences are important, they will receive proper notice. Our former opinions, in connection with this opinion, present all the pleadings and evidence necessary for an understanding of the points of our present decision. We shall proceed to the consideration of the questions raised by defendant's counsel in the order of their discussion by them.

II. A rule prevailing in the district court is in the following language: "Rule 2. In any case once continued, where an answer is on file, either party desiring to bring such cause on for trial at any term shall, at least ten days before such term, file with the clerk a notice of trial, and no such cause shall stand for trial unless a trial notice be so filed, except by consent of parties: provided, that, after the commencement of the term, the court may, in its discretion, by order entered of record, permit notices of trial to be entered in the same manner, ten days prior to such date as the court may name in such order. Such order may be general, and not entered of record in each particular case." The case

1. PRACTICE: trial notices: rule of court: construction: review.

had once been continued, and no notice under this rule had been given before the term. But after the commencement of the term a notice in accord with the rule was given in pursuance of an order entered of record in this case, as contemplated by the rule. But the order was special, applying in this, and no other, case. To the entering of this order defendant excepted, and now insists that it is erroneous. The ground of defendant's objection, as we understand it, is that the rule contemplates that the order shall be general, and should not be made applicable to one case. The district court, we think, rightly construed the rule to authorize the special order applicable to this case alone. We think the language of the rule plainly authorizes this conclusion. But were it doubtful, admitting an honest difference of opinion, we would not disturb the construction of the district court of its own rules. We would presume that such construction is in harmony with the intention with which the rule was adopted, and we would regard the construction as a part of the rule itself, settling the practice upon this point through the whole district. We therefore feel bound to follow the interpretation of the rule adopted by the district court, and affirm its ruling complained of by counsel.

III. Counsel for defendant insist that the evidence fails to support the verdict, and that the court below, therefore, erred in refusing to direct a verdict for defendant. This objection is based upon the claim that plaintiff, not being engaged in the operation of the railroad, cannot recover for the negligence of a co-employe, and that the negligence, if any were shown, was of a co-employe. We think the evidence tends to show negligence on the part of the person having charge of the piling of the timber, and its care, which caused the injury. This person had full control of the timber-yard, employed and discharged men, and is to be regarded as a vice-principal. He was sometimes absent from the yard and the care and management of the business, and matters were committed to or devolved on

2. MASTER and servant: negligence of vice-principal: liability.

another, who took his place, and exercised the authority with which he was charged. This other person is therefore to be regarded as a temporary vice-principal in the place of his superior. The evidence tends to show negligence on the part of those persons who were in charge of the timber and directed the manner of piling it. Certain it is that it cannot be claimed that there is such an utter absence of evidence as requires us to hold that the verdict of the jury was the result of passion or prejudice.

IV. Evidence was admitted, against defendant's objection, showing that Coller, the employe who acted for the vice-principal having charge of the yard, and who seemed to be a kind of an assistant of the vice-principal, was informed of the defects in the piling of the timber by having his attention directed to it by a witness. It is insisted that it was not shown that Coller had charge of the business, so that the notice to him would operate as notice to defendant. But the evidence is amply sufficient to warrant the conclusion (indeed, it is hardly contradicted) that Coller did have charge of the yard when plaintiff was injured, and was therefore the agent of defendant; and notice to such agent would bind the defendant.

3. ——: negligence: notice to vice-principal.

V. Counsel urge that the court erroneously refused instructions asked by defendant, to the effect that before the jury could consider the notice to Coller, they should find that he had some duty to perform in piling the timbers, or in connection with the piles. Coller was in charge of the yard, as an agent, and was bound to report to his principal whatever affected the property or defendant's interest in connection therewith. This duty did not rest upon the fact that he had piled the lumber, or had authority to take down the piles and rebuild them. Surely, if for any reason a pile of timbers would appear to be in a condition which would warrant the conclusion that it would fall, resulting in injury to defendant's property, Coller's duty required him to report the fact, whether he had or

THE SAME.

had not built the piles, or had or had not authority to do any labor, or make any outlay, to prevent them from falling.

4. PRACTICE: examination of witnesses: control of counsel.

VI. A witness for plaintiff was asked by the defendant whether certain statements made by him in his testimony were not without foundation in fact. An objection to the question was sustained. A preceding question to the witness, in language hardly proper, asked him to state if his testimony was not false. This the witness resented. We think the court rightly stopped the course of the examination. Witnesses may be so interrogated as to test their truthfulness; but this should be done in such manner that unseemly scenes between them and counsel may be avoided; and it is the duty of the court to exercise such restraining authority over counsel as will attain that end. We think the district court, in this instance, rightly arrested the course of examination pursued by counsel.

VII. The rulings of the district court upon the instructions given and refused, we think, are correct, and demand no separate consideration. Many of the instructions to the jury, we discover, were given upon the former trials, and some of them have been expressly approved by the court in the prior appeals in this case. They present proper rules applicable to the questions of negligence, liability of defendant therefor, etc., which are raised by the issues in the case. In our opinion the judgment of the district court ought to be

AFFIRMED.

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ECKERT v. DAVID *et al.*

Liquor Nuisance: INJUNCTION: PRIOR VOLUNTARY ABATEMENT. Where leased premises were used for the unlawful sale of intoxicating liquors, with the knowledge of the lessor's agent, but without such knowledge by the lessor, who was a non-resident of the state, and the lessor, upon learning of such unlawful use, in good faith caused the unlawful sales to be stopped, and the premises surrendered, and they were thereafter used only for lawful purposes, *held* that it was error to perpetually enjoin the lessor from maintaining the nuisance on the premises, and to render judgment against it for costs, though the action was begun while the nuisance still existed. (See opinion for cases followed and distinguished).

Appeal from Worth District Court.—HON. G. W. RUDDICK, Judge.

FILED, OCTOBER 2, 1888.

ACTION in equity, and the relief asked is an injunction to restrain the defendants from the commission of a nuisance by selling and keeping for sale intoxicating liquors in a certain building on real estate owned by the appellant. The relief asked was granted, and the brewing company appeals.

L. S. Butler, for appellant.

Pickering & Hartley and *Ed. Collin*, for appellee.

SEEVERS, C. J.—The facts are that the defendants David and Lamb entered into possession of the premises in which it is claimed the nuisance existed, and it will be conceded that they did so under a parol lease from one Knutsen, who claimed to be acting as the agent of the appellant, but whether he was authorized to lease the real estate is doubtful; but we think the appellant knew the defendants were occupying the premises. Under the evidence, however, it is uncertain whether

the appellant had knowledge that intoxicating liquors were sold or kept for sale therein. The appellant is a resident of or located in La Crosse, Wisconsin, and none of its officers had such knowledge, but possibly Knutsen had. It will be conceded that he had such knowledge, and that he was an agent of the appellant. The evidence shows that the defendants sold and kept for sale intoxicating liquors on said premises, and they failed to answer or deny the allegations of the petition, and have failed to appear. The defendants entered into possession about the first day of November, 1885, and the petition in this case was filed on the first day of March, 1886. On February 19, 1886, a notice was served on the appellant, notifying it that such petition would be filed on said day. The evidence is meager and indefinite, but we think it appears from a preponderance thereof that the appellant made efforts in good faith to compel the defendants to vacate the premises. The evidence tends to show that an action was commenced having this end in view. It further appears from a preponderance of the evidence that the defendants removed all intoxicating liquors from the premises on the twenty-seventh day of February, 1886, and surrendered possession thereof about March 6, 1886, to the appellant. As to the first fact just stated the evidence is not clear and definite, but we think the probabilities are as we have stated. From the time the defendants surrendered possession of the premises the same remained unoccupied until the latter part of July, 1886, when they were leased to one Everson, and have been used by him as a shoe-shop, and the premises were so occupied when this suit was tried in February, 1887. The appellant answered the petition on March 16, 1886, and denied that said premises were occupied as a place for the sale of intoxicating liquors, and also pleaded that the defendant had ceased to occupy the premises for any purpose. The material question is whether the nuisance had been in good faith voluntarily abated prior to the time the petition was filed, and we think the evidence so shows. It will be observed that the

appellant did not personally, nor did any of its officers, sell or keep for sale intoxicating liquors. It is only liable to the penalties of the law, if at all, because of the fact that it suffered and permitted the defendants to create a nuisance in premises owned by it. Now, if the nuisance ceased to exist by the voluntary action of the parties committing it under the circumstances above stated, in good faith, no good reason exists for perpetually enjoining the appellant from maintaining a nuisance on said premises, and rendering a judgment against it for costs. This case is more nearly like the cases of *Drake v. Kingsbaker*, 72 Iowa, 441, and *Shear v. Brinkman*, 72 Iowa, 698, than *Martin v. Blattner*, 68 Iowa, 286, and *Judge v. Kribs*, 71 Iowa, 183. As to the appellant the judgment of the district court is

REVERSED.

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COLEMAN V. REEL.

1. **Levy**: ON MORTGAGED CHATTELS: NOTICE. When an officer knows that chattels upon which he is about to levy are mortgaged, though he does not know to whom, he cannot escape liability to the mortgagee if he makes the levy and converts the property.

2. **Judgment**: IN REPLEVIN: INDEFINITENESS: NO PREJUDICE. A judgment in a replevin suit will not be reversed on account of indefiniteness in the description of the property where, from the whole entry, no harm could result therefrom.

3. **Evidence**: ERROR IN ADMISSION: CURED BY JUDGMENT. Error in admitting evidence of special damages is no ground for the reversal of a judgment which does not include any special damages.

Appeal from Pottawattamie District Court.—HON. GEORGE CARSON, Judge.

FILED, OCTOBER 3, 1888.

ACTION to recover the possession or the value of certain personal property. Trial to the court, judgment for the plaintiff, and the defendant appeals.

Fremont Benjamin, for appellant.

I. L. Statzell, for appellee.

SEEVERS, C. J.—It is stated in the petition that the plaintiff is the owner of "two red heifers, with some white in forehead, two years old; * * * one single buggy; * * * one iron-gray mare colt, about eight months old; * * * one bay spotted horse colt, about ten months old; * * * three Poland sows and eleven pigs, about seven months old. * * *" And such ownership is claimed under a chattel mortgage executed by one Collver, which had been duly acknowledged and recorded. It is stated in the petition that notice in writing of plaintiff's ownership of said property had been duly served on the defendant, and a copy of such notice is attached to and made a part of the petition. It is further stated that the defendant had actual notice of the mortgage. The defendant denied the allegations of the petition, but admitted that he, as sheriff, took possession of the property under and by virtue of a certain writ of attachment against said Collver.

I. It is insisted that the court erred in permitting the mortgage to be introduced in evidence, because the description of the property therein is not sufficient, and that the recording of such mortgage did not impart constructive notice thereof. We find it unnecessary to determine this question, for the reason that there was evidence tending to show that the defendant had actual notice that the property was mortgaged. Such evidence was sufficient to warrant the court in making the finding it did, and we cannot disturb it, under the settled practice of this court. The court was justified in finding that at the time the defendant made the levy he was notified that the property was mortgaged. This was sufficient to put him on inquiry, although he was not informed that the mortgage had been given to the plaintiff. We the more readily reach this conclusion, because we incline to

1. LEVY: on mortgaged chattels: notice.

think, taking the mortgage altogether, it was sufficient to impart constructive notice to the world.

II. We understand the record to show that all the property levied upon and described in the petition had been released by the defendant, except the two colts, and that the only controversy on trial was as to them. The value of the colts was proved to be one hundred dollars, and there is no evidence contradictory thereto. The court rendered judgment for the plaintiff for the "possession of the property in controversy, and in default of the return of said property" the court found the value thereof to be one hundred dollars, and judgment was rendered, therefore, for the plaintiff for that amount. It is insisted that the judgment is erroneous, because under it the plaintiff is entitled to the possession of all the property described in the petition. It would have been more definite and certain if the judgment had specifically described the property in controversy; but, inasmuch as the record as a whole sufficiently indicates and points it out, we feel sure that the plaintiff is not entitled to have the judgment reversed.

2. JUDGMENT: in replevin: indefiniteness: no prejudice.

III. It is insisted that the court erred in admitting evidence tending to show that the plaintiff sustained special damages by being deprived of the possession of the property. As the court did not render a judgment for any damages, the error, conceding it to be one, was not prejudicial. It is said that there is no sufficient evidence showing the service of the notice of ownership; but we think it was clearly sufficient, and that there is no error in this record.

3. EVIDENCE: error in admission: cured by judgment.

AFFIRMED.

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81	457
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112	331

CALLANAN *et al.* v. RAYMOND.

Tax Sale and Deed: NOTICE TO REDEEM: WHO ENTITLED TO: PERSON IN POSSESSION. Where at the time of giving notice to redeem land from a tax sale there was no one residing upon the land, but it was taxed to A., and C. held a contract for its purchase, but B. had a crop of corn growing on a small portion thereof, and otherwise it was not improved, *held* that service of the notice on B. was necessary to a valid tax deed; he being in possession in contemplation of the statute, even though he was not on or near the land at the time; and that it was immaterial whether or not he had any right to raise the corn on the land. (*Stoddard v. Sloan*, 65 Iowa, 681, *distinguished*).

Appeal from Kossuth District Court.—HON. LOT THOMAS, Judge.

FILED, OCTOBER 3, 1888.

ACTION to redeem land sold for delinquent taxes, and to quiet the title thereto in plaintiff. The cause was tried to the court, and a decree rendered in favor of plaintiff. The defendant appeals.

Clarke & Call, for appellant.

H. E. Long, for appellees.

ROBINSON, J.—On the third day of November, 1879, the east half of the southwest quarter of section 13, in township 99, range 28, in Kossuth county, was sold for the delinquent taxes of 1878. The certificate of sale was assigned to defendant, and a treasurer's deed issued thereon, and recorded on the first day of December, 1882. The evidence shows that on the eighth day of May, 1878, the American Emigrant Company, then owning this land, contracted to sell the same to one Elias Curtis. During 1880, Curtis broke thirteen acres

of it, and then went to Minnesota, where he remained until the fall of 1886. G. R. Bruns farmed the land in 1882, raising a crop of corn, which was taken off in October of that year. The contract with Curtis was cancelled on the first day of December, 1885, for a failure to comply with its terms. The right of plaintiffs to redeem in this action, in case defendant's title is insufficient, is not questioned. Plaintiffs allege that the deed to defendant is void, because no notice of the expiration of the time of redemption was served upon Bruns. It seems to be conceded that such notice was not served upon Bruns; but it is insisted by appellant that it was not required, because Bruns was a trespasser, who had taken possession of the land without any right or claim of right, and because he was not in possession when the deed was executed. Notice was required in this case, because the land was assessed and taxed in the name of George M. Bartholomew. Notice was given to Bartholomew in August, 1882. If at that time the land was in possession of any one, the law required the notice to be served on him, even though he abandoned it before the deed was issued. The question to be determined, then, is whether Bruns had such possession of the land in August as made it necessary to serve him with notice. Appellant insists that he was a mere trespasser, but we find no evidence to that effect. It is true that Curtis, who held a contract for the land, was in Minnesota, but we cannot presume from that fact that Bruns was a wrong-doer. The question of Bruns' right to farm the land does not seem to us to be material. If he was in possession when the notice was given it should have been served on him. Appellant insists that there is no evidence that any one was in possession of the land in August, 1882. There were no buildings on the land at that time, and it is not shown that Bruns was on or near it during that month. But it does appear that his crop of corn was then growing upon it, and that was evidence and notice of possession of a satisfactory kind, and sufficient to make it necessary to serve him with the statutory notice. It was not necessary for him to reside upon the land,

nor to be upon it when the notice was given. His growing crop was a continual assertion of possession. It is said, however, that appellant had a right to presume that the crop belonged to the one who, according to the record, owned the land. But the possession contemplated by the statute is actual, as distinguished from that which the record might show. The case of *Stoddard v. Sloan*, 65 Iowa, 681, does not announce a contrary doctrine. In that case the acts relied upon as showing possession were not performed with a view of taking possession, nor asserting ownership, nor improving the land. For failure to serve Bruns with notice, defendant's deed must be set aside. Other questions discussed by counsel need not be considered, as they are not material to the conclusion we reach. The decree of the district court is AFFIRMED.

HALFMAN *et al.* v. SPREEN.

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Liquor Nuisance: INJUNCTION AFTER VOLUNTARY ABATEMENT: GOOD FAITH. An action to abate and enjoin a liquor nuisance was begun May 19, 1886. The cause was not tried until February 3, 1888. Defendant was maintaining the nuisance when the action was begun, and continued to do so until four days before the trial. *Held* that such recent reformation was no ground for refusing, upon the hearing, a perpetual injunction of the nuisance, and such other orders as would effectually abate it. (*Judge v. Kribs*, 71 Iowa, 183, and *Danner v. Hotz*, 74 Iowa, 389, *followed*).

Appeal from Lee District Court.—HON. J. M. CASEY, Judge.

FILED, OCTOBER 3, 1888.

ACTION in chancery to restrain and enjoin defendant from maintaining a nuisance by keeping a saloon wherein are sold intoxicating liquors in violation of law. The district court entered a judgment against defendant for costs, but dismissed the petition of the plaintiff and intervenor. The intervenor Andrews appeals.

Newman & Blake, for appellant.

No appearance for appellee.

BECK, J.—I. The plaintiff Andrews became a party to the action upon his petition of intervention. The original petition was filed May 19, 1886, and the intervenor's petition was filed July 7, 1886. The defendant, in his answer, admits that when the original petition was filed he kept a saloon in the building therein described, but he alleges that when his answer was filed, February 3, 1888, he had quit the business, and was not then keeping a saloon. The evidence shows that until a motion for a temporary injunction was made in this case, on the third day of February, 1888, defendant was engaged in keeping the saloon as he had been when the action was commenced, but that after that date he quit selling intoxicating liquors. The district court, on the ground, doubtless, that defendant, at the time of the trial, February 3, 1888, was not engaged in selling intoxicating liquors, and had not been after January 30, 1888, dismissed the petition, declining to enter a decree providing for the abatement of the nuisance, but entered a judgment against defendant for costs, including fees allowed to plaintiff's counsel. Defendant does not appeal, and no question therefore arises as to the correctness of the action of the court in rendering judgment against defendant for costs after dismissing the petition.

II. The district court ought, upon the evidence, to have rendered a decree abating the nuisance, and enjoining defendant from maintaining it by the unlawful sale of intoxicating liquors. The evidence required such a decree, in view of the fact that it was shown and admitted by defendant in his answer that since the commencement of the action, and up to three or four days before he filed his answer and the trial, he had been engaged in keeping a saloon. The court will not hear with favor and indulgence a defendant admit that for years he has been engaged in the violation of the law, and claim protection and escape from the penalties

and remedies provided for by the statute on the ground of reformation for the brief time of three or four days. Defendant admits that he did violate the law, but asks to be relieved from the restraints of an injunction on the ground that he has quit violating the law. Reformation of such brief duration, and profession of obedience to the law supported by practice of obedience for only three or four days, are not sufficiently pursuasive to win confidence that the defendant will not again maintain the nuisance which he has so recently suspended. Our conclusions are in accord with our prior rulings. See *Judge v. Kribs*, 71 Iowa, 183; *Danner v. Holz*, 74 Iowa, 389. The decision of the district court is reversed, and a decree will be entered in this court forever restraining defendant from unlawfully selling intoxicating liquors in the premises described in the petition, and containing such other orders as will effectually abate the nuisance. REVERSED.

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RAND & CO. v. GARNER *et al.*

1. **Judgment:** LIEN ON EQUITY IN LAND. A judgment is a lien upon the equitable interest in real estate owned by the defendant at the time of its rendition, or subsequently acquired. (Code, sec. 2882). Accordingly *held* that a judgment against defendant was a lien on real estate which he subsequently acquired and took possession of under a contract of purchase, though it had not been conveyed to him.

2. ———: IN JUSTICE'S COURT: TRANSCRIPT: DURATION OF LIEN. A judgment rendered in a justice's court, a transcript of which is filed in the district court, becomes a lien on real estate for ten years from the filing of the transcript, and not from the date of the judgment only. (See Code, sec. 3568, and *McCoy v. Cox*, 54 Iowa, 595).

Appeal from Taylor District Court.—HON. J. W. HARVEY, Judge.

FILED, OCTOBER 3, 1888.

ACTION in equity to foreclose a mortgage on real estate. Judgment was entered against the mortgagor, Garner, by default. Windson & Cathcart were made defendants, and it was alleged that the interest claimed by them in the mortgaged premises was inferior to the lien of the mortgage. They answered alleging a senior lien on the property under a judgment against Garner. The judgment determined that theirs is the superior lien. Plaintiffs appeal.

Crum & Haddock, for appellants.

J. L. Brown and *Charles Thomas*, for appellees.

REED, J.—There is no dispute as to the facts. In January, 1877, Windson & Cathcart recovered a judgment in justice's court against defendant Garner, and in December, 1881, a transcript of said judgment was filed in the office of the clerk of the circuit court, and a memorandum thereof was duly entered by the clerk in the proper record. In 1883, Garner entered into a parol contract with one Long for the purchase of the property in question, which is a lot in Bedford. He did not pay any part of the purchase money, but he took possession of the lot, and erected a dwelling-house thereon, which he subsequently occupied with his family as a place of residence. He purchased the lumber for said building from plaintiffs, and on the first of January, 1886, he executed his promissory note to them for the amount of the lumber-bill, and gave a mortgage on the premises to secure the same. He has paid the interest on the note given to Long for the price of the lot for two years, but has made no other payments upon it, and Long has not conveyed it to him.

I. The first question argued by counsel is whether Garner acquired any interest in the real estate by his contract with Long, upon which the judgment could attach as a lien. As stated above, he was in possession under a contract of purchase, but had not received a conveyance. The

1. JUDGMENT: lien on equity in land.

relation between him and Long is that of mortgagor and mortgagee of the property. He is the equitable owner, but Long holds the title as security for the price. A judgment is a lien upon an equitable interest in real estate owned by the defendant, at the time of its rendition, or subsequently acquired. Code, sec. 2882; *Harrison v. Kramer*, 3 Iowa, 543; *Cook v. Dillon*, 9 Iowa, 407; *Denegre v. Haun*, 13 Iowa, 240. The transcript of the judgment having been filed before he acquired the interest, it at once, upon the purchase of the property, became a lien upon his interest.

II. The lien of a judgment continues for ten years after its rendition. Code, sec. 2882. This suit was instituted within ten years after the filing of the transcript in the clerk's office, but more than ten years after the judgment was rendered by the justice. The important question in the case is whether the time during which the lien continues commences at the date of the rendition of the judgment by the justice, or that of the filing of the transcript in the office of the clerk. If the time is to be computed from the former date, the lien terminated before this suit was instituted. If from the latter, it continues, and is superior to plaintiff's mortgage. Section 3568 of the Code is as follows: "The clerk shall forthwith file such transcript and enter a memorandum thereof in his judgment docket, noting the time of filing the same, and from the time of such filing it shall be treated in all respects, as to its effect and mode of enforcement, as a judgment rendered in the circuit court as of that date; and no execution can thereafter be issued by the justice on the judgment." Under that provision, we think the judgment has all the force and effect of a judgment rendered by the circuit court as of the date of the filing of the transcript. In *McCoy v. Cox*, 54 Iowa, 595, it was held that such a judgment might be enforced by execution issued at any time within twenty years from the date of the filing of the transcript, which is the time within which judgments in the circuit or district courts may be so enforced. Code,

2. ——: in justice's court: transcript: duration of lien.

secs. 2529, 3025. But if it should be regarded as a judgment rendered by a justice of the peace, execution could not be issued after ten years from the date of its rendition. *Id.* sec. 3569. It is said in both the majority and minority opinion, in *McCoy v. Cox*, that the lien is an effect of the judgment, and clearly that must be true, for it is the result or consequence of the judgment. We think, therefore, that the district court rightly held that the lien of the judgment had not terminated.

AFFIRMED.

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NESBIT v. THE TOWN OF GARNER.

1. **Negligence:** OF DRIVER: IMPUTATION TO INVITED PASSENGER. In an action against the defendant town for an injury to the plaintiff caused by a defect in defendant's street, it appeared that plaintiff was at the time of the injury riding in the carriage of a neighbor, upon his invitation, and that the carriage was driven by one who had been the neighbor's servant, but whose term of service had expired on the previous day, and that the driver was guilty of negligence contributing to the injury, and that plaintiff neither assumed nor exercised any control over the driver of the team. *Held* that in such case the contributory negligence of the driver could not be imputed to plaintiff so as to defeat his recovery. (See opinion for cases distinguished, and for a discussion of the doctrine of imputed negligence upon the authorities).

2. ——: ——: ——: COMMON PURPOSE: QUESTION FOR JURY. In such case, if the driver and the plaintiff were at the time of the accident engaged in the pursuit of a common purpose, the negligence of the driver might have been imputed to plaintiff, under the rule of *Payne v. Chicago, R. I. & P. Ry. Co.*, 39 Iowa, 523, and whether they were so engaged was a question for the jury under the evidence.

3. **Evidence:** WEIGHT: COMPETENCY. Measurements of a depression in a street, taken some time after an accident caused thereby, and after the depth of the depression had increased, were competent to show the condition at the time of the accident, where other testimony showed the amount of the change.

Appeal from Hancock District Court.—HON. JOHN B. CLELAND, Judge.

FILED, OCTOBER 3, 1888.

ACTION for the recovery of damages for a personal injury caused, as was alleged, by a defect in a public highway which defendant was bound to maintain. Verdict and judgment for defendant. Plaintiff appeals.

J. F. Thompson, *C. H. Kelly* and *L. S. Butler*, for appellant.

Bush & Wichman and *W. E. Bradford*, for appellee.

REED, J. I.—Plaintiff, when riding on one of the streets of the defendant town, was thrown from the vehicle in which he was riding, and sustained serious injuries. The accident happened at a plank crossing, constructed and maintained by the town, at the intersection of two streets. The negligence alleged is that the crossing was built above the level of the street, and that it was not so filled in on the sides as to form a proper and safe approach. The evidence tended to prove that the earth, which had originally formed the slopes from the level of the street to the top of the crossing, had been worn away on one side, and that the accident was caused by the dropping of the front wheels of the vehicle into this depression. Plaintiff resided in the country, and on the day of the injury he was invited by one of his neighbors to accompany him to the town. They were accompanied by William Sheridan, who had been in the employ of the neighbor, but his term of service had expired the day before. The vehicle in which they rode, and the team by which it was drawn, belonged to the neighbor. Some time after they arrived in town, plaintiff and Sheridan went to a shop for the purpose of procuring some shovels belonging to a brother of the owner of the team and wagon, which he had requested them to carry to the country for him, and it was when they were driving from the shop to another part of the town that the accident occurred. Sheridan was driving the team at the time, and plaintiff testified that he neither gave any direction as to the manner of driving, nor assumed any control over the team or its movements.

1. NEGLIGENCE: of driver: imputation to invited passenger.

The district court gave the following instruction: "The law is that the driver of a private conveyance is the agent or servant of the person riding in such conveyance, and if such person, while riding along a public highway or street, is injured, in consequence of obstructions or defects negligently permitted to remain in the street or highway, and the driver is guilty of a want of ordinary care and caution, and his negligence materially contributes to such injury, then the persons injured cannot recover as against the town for the injury thus received." The principal question in the case is as to the correctness of this instruction.

That cases may arise in which the contributory negligence of another will be imputed to the one injured, and defeat his right of recovery for the injury, is certainly true, and that doctrine has been applied by this court. In *Payne v. Chicago, R. I. & P. Ry. Co.*, 39 Iowa, 523, it was held that all right of action in plaintiff's favor, for the injury he had sustained, was defeated by the gross negligence of the driver of the vehicle in which he was riding.

In *Yahn v. City of Ottumwa*, 60 Iowa, 429, it was held that the negligence of the plaintiff's husband, with whom she was riding at the time, contributing to the injury, would be imputed to her, and would defeat a recovery. But neither of those cases sustains the doctrine of the instruction. In the first case, the plaintiff and three others were riding together. The wagon and team belonged to one not a member of the party. It was under the control of one of the party, but at the time of the accident was being driven by another. The holding in the case is not based upon the idea that the relation of principal and agent existed between the plaintiff and the person who was driving the team at the time, but rests upon the fact that the parties were engaged in a common enterprise or purpose, in which each, to some extent, was responsible for the acts and conduct of the others. In the other case the evidence tended to show that the injury was occasioned by the act of the husband in driving upon an obstruction which

was in plain view. The doctrine that his negligence is imputed to her does not rest upon any supposed agency of the husband, but upon the relation of the parties. Under such circumstances, the wife is under the care of the husband. Her situation is very different from that of the friend or guest who, upon his invitation, rides with him for pleasure or convenience, but to whom he owes no special duty.

In *Slater v. Burlington, C. R. & N. Ry. Co.*, 71 Iowa, 209, the plaintiff, who was an infant of tender years, received the injury complained of when riding with his mother and natural guardian. The district court instructed that, if the mother had negligently exposed him to the danger, there could be no recovery. The correctness of that ruling was not controverted in this court upon the original submission; and we reversed the judgment against the defendant upon the ground that, under it and the undisputed testimony, the verdict should have been the other way. A petition for rehearing was afterwards filed, in which, and in an oral argument in support of it, the doctrine of the instruction was combated with great learning and ability. But we felt ourselves constrained to overrule the petition without considering the question as to the correctness of the instruction, on the ground that, whether correct or not, the jury were not at liberty to disregard it.

In *Stafford v. City of Oskaloosa*, 57 Iowa, 748, language is used which appears to support the doctrine of the instruction, and that case has been cited by other courts and text-writers in support of it. When the record is looked into, however, it does not commit this court to the doctrine. In its facts it was similar to the present case. The plaintiff, by invitation of Clark, was riding with the latter, who owned and was driving the vehicle and team. The sleigh was driven upon an obstruction, and overturned, and plaintiff was injured. The circuit court gave an instruction substantially the same as the one in question. The city was the appellant, and, as the instruction was favorable to it, of course the appeal did not bring the question as to its correct-

ness here for review. Nor was it contended that it was erroneous. In the eighth division of the opinion, in discussing another instruction, it is said that if Clark was negligent the plaintiff could not have recovered, whether he did or did not have knowledge of Clark's prior negligence,—that being the subject to which the instruction under consideration related. This language was used with reference to the law of the case as settled by the instruction, and which, upon the record before us, we could not review, but were bound to accept as correct, and was not intended as the annunciation of a general principle. The holding of those cases, then, is (1) that when several parties are engaged in a common enterprise, and one is injured by the joint negligence of one of his associates and another, the negligence of his associate will be imputed to him, and will defeat all right of recovery against the other party; and (2) that when a person is injured through the common negligence of one, who, from their relation, is bound to care for and protect him, and another, the negligence of the former will be imputed to him, and will defeat a recovery against the other party. But that is as far as this court has gone. And we have never had occasion to consider the doctrine of the present instruction. That doctrine, in effect, is that when one rides upon the public highway in the vehicle of another, the driver, as matter of law, becomes his agent or servant in such sense that his negligence, contributing to an injury occasioned by a defect or obstruction in the highway, will be imputed to him, regardless of the real relations of the parties. That this doctrine finds support in some of the adjudicated cases is certainly true. *Thorogood v. Bryan*, 8 C. B. 114, is perhaps the leading case supporting the doctrine. In that case the plaintiff, having alighted from an omnibus, was run over and injured by a vehicle belonging to another line. The action was against the proprietor of the carriage which inflicted the injury; and it was held that, as the driver of the vehicle from which the plaintiff alighted was negligent in that he had neglected to drive his carriage to the curb, which negligence contributed to

the injury, there could be no recovery. The case, however, has been criticised in England (*The Milan*, Lush, 388), and it has not been generally followed in this country. Indeed, many American courts, whose opinions are of the highest authority, have pronounced it unsound. See *Bennett v. N. J. Ry. & T. Co.*, 36 N. J. Law, 225; *N. Y., L. E. & W. Ry. Co. v. Steinbrenner*, 47 N. J. Law, 161; *Chapman v. New Haven Ry. Co.*, 19 N. Y. 341; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228; *Transfer Co. v. Kelly*, 36 Ohio St. 86; *Wabash, St. L. & P. Ry. Co. v. Shacklet*, 105 Ill. 364; *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 391. And we think the doctrine is contrary to sound reason and well-settled legal principles. Of course, the general doctrine that the principal is bound by the acts and conduct of his agent is not disputed. If he suffers an injury through the negligence of another, but to which the negligence of his servant, or agent, while engaged in the business of his employment, contributes, there can be no recovery. But the relation of principal and agent must exist in fact. The law will not create or presume the relation from the mere fact that he accepted the invitation of another to ride in his carriage. If he is but the guest of the other, and neither has nor assumes the right to direct or control the conduct of the driver, neither he nor the owner can be regarded as his servant. In such case he would not be answerable to a third person for an injury caused by the negligence of the driver; and it seems to us that there is no principle of law upon which such negligence can be imputed to him when it contributes to his own injury. In the present case the evidence tended to prove that plaintiff was riding in the vehicle, on the invitation of the owner, and that he neither exercised nor assumed any control over the movements of the team.

II. But it was contended that, when plaintiff and Sheridan went with the team to the shop, they engaged in a common enterprise, and that the case is therefore within the rule of *Payne v. Ry. Co.*, *supra*. But whether that was true was a question for the jury, and should have been

2. —: —: —: common purpose: question for jury.

submitted for their determination. The doctrine of the instruction, however, is that if Sheridan's negligence contributed to the injury, there could be no recovery, whether that was true or not.

III. The court excluded the evidence of certain measurements made by plaintiff and others, some time after the accident, to determine the depth of the depression at the side of the crossing into which the wheels dropped. The ground of the ruling was that it did not appear that the ground was in the same condition when the measurements were made as at the time of the accident. The witnesses, however, made such comparisons of its condition at the different times as that the measurements afforded some *data* by which to determine the depth of the depression at the time of the accident. The objection, we think, went rather to the weight of the evidence than to its competency, and it should have been overruled.

8. Evidence: weight: competency.

REVERSED.

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ROBERTS v. MORRISON.

1. **Promissory Notes:** ACTION ON: MISJOINDER: NO PREJUDICE. Plaintiff in an original petition declared on three promissory notes, and in an amendment he set up what defendant denominated a cause of action for fraud and conspiracy, and the latter now complains that the trial court refused to strike the amendment from the files, and thus permitted a misjonder of causes of action, and let in evidence prejudicial to him. But since the evidence complained of was not irrelevant to the issues raised on the action on the notes, and the jury found against defendant on those issues, *held* that the misjoinder, if there was any, was without prejudice.

2. **Witnesses:** IMPEACHMENT: WEIGHT OF EVIDENCE: INSTRUCTIONS. A witness was sought to be impeached, and six witnesses testified that his reputation for truth and veracity was bad, and nine that it was good. The court, in an instruction, said: "If you find that his credibility is sustained by as many credible witnesses as discredit his credibility, he cannot properly be held or found to be impeached." *Held* that this, standing alone, was not correct, but that, when considered with the rest of the charge, as it should be, the jury must have understood the court to mean that if not less than six of the nine witnesses who discredited the witness sought to be impeached were equally as credible as the six who testified to the contrary, then he could not be regarded as impeached; and that, so considered, the instruction was not erroneous.

3. **Promissory Notes:** EXECUTION: EVIDENCE. Defendant denied executing the notes in suit, but the jury found against him on that issue. His name was William T. Morrison, and he had a nephew named William Alexander Leroy Morrison. The notes were signed simply "William Morrison." It was shown that defendant had signed other papers in that way, and there was evidence from which the jury might have found that he signed the notes in person. There was evidence, also, from which the jury might have found that they were signed by the nephew, with the understanding and intention between him and the nephew that the signature should be imposed on the plaintiff as that of the defendant, and it was shown that he obtained a large portion of the property for which the notes were given, and that the nephew was a minor and insolvent. *Held* that the verdict against defendant could not be disturbed for want of evidence.

Appeal from Madison District Court.—Hon. O. B. Ayres, Judge.

Filed, October 3, 1888.

On the twenty-second day of November, 1886, the plaintiff filed his original petition, in which he demanded judgment against defendants Joshua and William Morrison for the amount of three promissory notes set out in the petition. Judgment was rendered against Joshua. On the sixteenth day of February, 1887, appellant filed his separate answer, in which he denied that he had executed the notes, and alleged that the several signatures thereto were not his genuine signatures. This answer was verified. May 4, 1887, plaintiff filed an amendment to his petition, in which he alleged in substance that the notes in suit were given for stock purchased at a public sale held by plaintiff; that they were given on the part of the makers in pursuance of a conspiracy between appellant and Joshua and their nephew, William A. Morrison, for the purpose of cheating and defrauding plaintiff; that by the terms of said conspiracy Joshua was to attend the sale, and buy a large amount of property, with the express understanding with plaintiff that appellant should sign the notes to be given therefor as surety, and that, when said notes matured, it should appear that the nephew, who was an irresponsible minor, had signed the notes, instead of appellant; that appellant was to receive the greater part of the property to be so purchased; that stock was purchased, and notes delivered, pursuant to said conspiracy; that appellant either signed said notes in person, or authorized the nephew to sign the name of William Morrison to them, and assented to the fraud practiced on plaintiff and consummated; that appellant secured a large share of the property so purchased; and that Joshua was insolvent. On the seventh day of May, 1887, appellant filed an answer to the petitions as amended, in which he denied each and every allegation thereof. On the twelfth day of May 1887, appellant

filed a motion for leave to withdraw his answer, and to strike certain portions of the amendment to the petition, on the ground that they were irrelevant to the original cause of action, and that, considered as stating a cause of action for fraud and conspiracy, they were improperly joined. The motion was overruled, and the trial commenced on the same day. On the next day plaintiff filed a reply, in which he repeated in substance the matter set out in his amendment to the petition. This does not seem to have been attacked by appellant. The cause was tried to a jury, and a verdict returned in favor of plaintiff for the amount of the notes, to-wit, $764.37. A motion for a new trial having been overruled, judgment was rendered in favor of plaintiff for the amount of the verdict and costs, and William Morrison appeals.

V. Wainwright and *Barcroft & Bowen*, for appellant.

Dabney & Guiher and *John Leonard*, for appellee.

ROBINSON, J.—I. The first question we are required to determine is the correctness of the ruling of the court on the motion for leave to withdraw answer, and to strike. Counsel for appellant urge strenuously that the rulings permitted a misjoinder of causes of action, and that, notwithstanding the fact that the jury based their verdict on the notes, and not on the alleged fraud, yet the latter was in issue, and the evidence given to establish it was of a nature to prejudice appellant. We do not find it necessary to consider this branch of the question. One of the theories upon which the case was tried was that appellant had, by his participation in the alleged conspiracy, authorized his nephew to sign the notes in suit in his name, or in a name which it is shown he used in signing written instruments. The evidence, which might have been competent to sustain a claim based on fraud, also tended to show that the nephew had signed the

1. PROMISSORY notes: action on: misjoinder: no prejudice.

notes as the agent of appellant. Under the issues presented by the so-called "reply," this evidence was competent. Since the jury found, in effect, that appellant had made the notes in suit, the action of which appellant complains as erroneous must have been without prejudice.

II. John R. Morrison, a brother of defendant's, gave testimony as to the alleged conspiracy, which was material as bearing upon the question of the authority of the nephew to append the name of appellant to the notes. Six witnesses testified that John's reputation for truth and veracity in the neighborhood where he lived was bad; nine others testified that it was good. The court charged the jury, in regard to this, as follows: "There has been evidence introduced tending to show the reputation of the witness John Morrison for truth and veracity in the neighborhood in which he lives. If you believe from all the evidence introduced on the subject, that said witness' reputation for truth and veracity in the neighborhood where he lives is bad, you will consider the fact as bearing upon his credibility as a witness; but you should not for that reason alone entirely disregard his testimony—especially in those particulars, if any, in which he is corroborated by other credible witnesses, or by facts and circumstances shown by the evidence in this case. If you find that his credibility is sustained by as many credible witnesses as discredit his credibility, he cannot properly be held or found to be impeached." It is insisted by appellant that the last sentence of the paragraph quoted is erroneous. If the jury might have concluded from the charge as a whole that this sentence instructed them that the testimony of all credible witnesses was entitled to equal weight, then it was not only erroneous, but probably prejudicial. Facts are established, not by the greater number of witnesses, but by the greater weight or value of the evidence given. But in this case the jury were told that the court "has not attempted or intended to embody in any one instruction all of the law applicable to the case.

2. WITNESSES: impeachment: weight of evidence: instructions.

You are to consider and construe together all of the instructions, and apply them as a whole to the evidence in the case." In the paragraph of the charge immediately following that to which objection is made, the jury are told that "in determining the issues in this case, you should take into consideration the whole of the evidence, and all of the facts and circumstances proved on the trial, giving to the several parts of the evidence such weight as you think they are entitled to; and, in determining the credibility and weight to be given to the testimony of the several witnesses, you should take into consideration their interest in the result of the suit; his or her conduct and demeanor while testifying; his or her apparent candor or bias, if any such appears; his or her prejudice or feeling for or against either party, if any such appears; the reasonableness or unreasonableness of the story told; and all the evidence and circumstances tending to corroborate or contradict any or all of the witnesses; and from all these matters and things determine and give to the testimony of each and all of the witnesses such weight as you, in the exercise of your best judgment, believe the same fairly entitled to at your hands. You are not bound to take the testimony of any witness as absolutely true; and you should not do so if you are satisfied, from all the facts and circumstances proved on the trial, that such witness is mistaken in the matters testified to by him or her, or that from any other reason his or her testimony is untrue or unreliable." Taking the charge as a whole, it is evident that the court did not instruct the jury that they must give equal weight to the testimony of all credible witnesses. The liability of a credible witness to be mistaken is recognized. The jury must have inferred from the portion of the charge in question that, if not less than six of the nine witnesses who testified that the reputation of John R. Morrison for truth and veracity were equally as credible as the six witnesses who testified to the contrary, then his credibility had not been impeached; and this, we think, was correct. We do not approve the language used by the court; but hold that, as modified

and explained by other portions of the charge, it could not have been prejudicial. *State v. Pierce*, 65 Iowa, 89; *Dixon v. Stewart*, 33 Iowa, 128.

III. The sufficiency of the evidence to sustain the verdict of the jury has been discussed by counsel at considerable length. It is not necessary for us to review the arguments made. Appellant claims that his name is William T. Morrison; but signatures admitted to have been made by him, where the signature was like those attached to the notes in suit, *i. e.*, "Wm. Morrison," or "William Morrison," were admitted in evidence. He received a considerable number of the cattle purchased. Evidence was given which tended to show that a conspiracy was formed as alleged; that appellant was fully advised in regard to it, and participated in it; and that he knew that the notes were to be signed by the nephew, and delivered to plaintiff as his own. The name of the nephew was William Alexander Leroy Morrison, hence the signatures appended to the notes more nearly represented the true name of appellant than of the nephew. Evidence was submitted from which the jury might have found that appellant himself signed the notes, or that they were signed by the nephew with his knowledge and assent. In our opinion the evidence sustains the verdict.

8. PROMISSORY notes: execution: evidence.

AFFIRMED.

WICKHAM V. WINCHESTER.

Specific Performance: CONVEYANCE OF LAND: BAD FAITH OF PLAINTIFF. Defendant told plaintiff that he had withdrawn certain real estate from sale. Within forty-eight hours, at the farthest, after being so informed, plaintiff resorted to defendant's agents and procured from them a contract for the purchase of the land. They had had no notice of the withdrawal, and plaintiff did not inquire as to the date of the authority under which they acted. *Held* that he acted in bad faith in procuring the contract, and that equity would not enforce it at his suit.

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Appeal from Pottawattamie District Court.—HON. H. E. DEEMER, Judge.

FILED, OCTOBER 3, 1888.

ACTION in equity to enforce specific performance. Judgment for plaintiff, and defendant appeals.

Henry Ford, for appellant.

Geo. A. Holmes and *L. W. Ross*, for appellee.

SEEVERS, C. J.—The plaintiff claims to have purchased of an agent of the defendant certain real estate, and in all respects to have complied with the contract on his part. The material allegations of the petition are denied by the defendant. We find from the evidence that the defendant was the owner of the real estate in controversy, and Odell Bros. & Co. were real-estate brokers. The defendant gave such brokers, some months prior to the sale, the right to sell the real estate, which they did to the plaintiff on the terms named by the defendant, except that defendant stipulated that the deferred payments should bear interest at eight per cent., but said brokers, when they sold to the plaintiff, contracted for only six per cent. interest on the deferred payments. We, however, have been unable to find any evidence in the record showing that the defendant

refused to comply with the contract on this ground. The plaintiff endeavored to purchase the real estate of the defendant on several occasions, but they were unable to agree upon terms, and at the last interview they had upon this subject the defendant informed the plaintiff that the property was not for sale; that he had withdrawn it from sale. On the next day, as the defendant testifies, the purchase of Odell Bros. & Co. was made. The plaintiff testifies that the interview with the defendant took place a day earlier than stated by the latter. The defendant did not notify Odell Bros. & Co. that he had withdrawn the real estate from sale, nor did the plaintiff inform the latter that the defendant had done so. Some of us are in doubts whether there is a fair preponderance of the evidence in favor of the propositions upon which the plaintiff relies; that is to say, whether, but for what we shall presently state, there was any contract entered into between the plaintiff and Odell Bros. & Co. which can be regarded as sufficient to entitle the plaintiff to a specific performance. But, conceding there is, we think the fact that the plaintiff was informed that the real estate had been withdrawn from sale bars his right to such relief. Having such knowledge, he made the purchase within twenty-four or forty-eight hours thereafter of reputed agents of the defendant, without making inquiry as to their authority, and ascertaining whether it ante-dated the information received by him directly from the defendant. The plaintiff took, we think, an undue advantage of the defendant that is inconsistent with fair dealing, which cannot and should not be disregarded in a court of equity. The fact that Odell Bros. & Co. had no knowledge that the land had been withdrawn from sale—and it may be conceded that they acted in the utmost good faith—is immaterial; the plaintiff had such knowledge, and as to him the defendant did all that he was required to do, whatever might be the rule had the sale been made to one who had no such notice. The appellee insists that the defendant, after he obtained full knowledge of the sale and its terms and conditions, ratified it,

and therefore he is now bound to specifically perform the same. In our opinion the evidence utterly fails to show such ratification. The judgment of the district court is reversed, and the cause remanded, with directions to enter a judgment in accordance with this opinion; or the defendant, at his election, may have a decree in this court.

REVERSED.

KING v. MAHASKA COUNTY.

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1. **Counties:** CONTRACT FOR COURTHOUSE: IN EXCESS OF AMOUNT VOTED: ULTRA VIRES. The people of the defendant county voted seventy-five thousand dollars to build a courthouse. The plaintiff contracted to build the house for that amount according to certain plans and specifications. The contract provided for possible changes in the plans and specifications, the differences of cost on account of which were to be added or deducted, as the case might be. Changes were made which greatly increased the cost of the work, and the additional amounts which plaintiff was to have for such changes were agreed upon, but no corresponding changes were made to diminish the cost of the work. *Held* that all agreements whereby the total cost of the work was to exceed the sum of seventy-five thousand dollars were in excess of the authority of the supervisors, and therefore void, and that plaintiff could recover nothing on account thereof; and that the case was not altered by the fact that the people afterwards voted an additional sum to complete the building which plaintiff failed to finish under his contract. (See opinion for cases cited).

2. **Instruction:** ERROR WITHOUT PREJUDICE. An instruction which erroneously excludes a claim on a contract is without prejudice where it appears that the contract was void.

3. **Counties:** ULTRA VIRES CONTRACT: PAYMENT: CONCLUSIVENESS. Where changes subsequently made in a contract for the erection of a courthouse contemplated and involved an expenditure of money in excess of the amount voted therefor, but the work done under these additional and void contracts was paid for in the periodical estimates made by the architect, and afterwards the contractor brought an action against the county for a large sum of money, involving all the transactions between the parties, based on the several contracts, *held* that by the payment of the architect's estimates the county was not concluded from insisting that the additional contracts were illegal, and that all the money paid should be regarded as paid on the amount named in the original contract. (*Long v. Boone County*, 36 Iowa, 60, *distinguished*).

4. ———: CONTRACT FOR COURTHOUSE: VOID CHANGES: FAILURE TO COMPLETE: RECOVERY. Plaintiff agreed to complete a courthouse for defendant for a certain sum. Subsequent changes were made in the contract, providing for the payment of a larger sum, but they were void. Upon a failure to complete the house, the county, under the provisions of the contract, took possession of and completed it. In an action against the county for an alleged balance due the plaintiff, it appeared that more than the original contract price had already been expended, and that the building was not then completed. *Held* that plaintiff 's obligation was to complete the house for the original contract price, and that he was not entitled to recover the ten per cent. which had been retained out of each month's installment to secure the completion of the work.

5. **Appeal**: PRACTICE: COST OF ADDITIONAL ABSTRACT. Appellee filed an additional abstract in this case setting out all of the evidence, which appellant complains of as being unnecessary, and asks that the costs thereof be taxed to appellee. But the claim of appellee, that its purpose was to show that the evidence sustained the judgment appealed from, appearing to be made in good faith, the costs of the abstract are taxed to the appellant, upon the affirmance of the judgment.

Appeal from Keokuk Circuit Court.—HON. W. R. LEWIS, Judge.

FILED, OCTOBER 3, 1888.

ON the twenty-first day of July, 1881, the plaintiff and the defendant entered into a written contract for the building of a courthouse. By the terms of the contract the building was to be completed by the first day of May, 1883. The house was not completed by that time, and the plaintiff continued work on the building until November 1, 1883, and, it being still uncompleted, the defendant took possession thereof, and prosecuted the work on its own account, under the claim that the plaintiff had forfeited his contract. This action was brought by the plaintiff to recover damages in the sum of fifty thousand dollars for the failure of the county to comply with its part of the agreement, whereby the plaintiff was prevented from completing the building. The defendant answered, and also set up a counter-claim, in which a large amount of money was claimed of the plaintiff as damages for his failure to perform his contract. There was a trial by jury, and a verdict and

judgment for the plaintiff for one dollar, and he appeals.

John F. Lacey and *Geo. D. Woodin*, for appellant.

L. C. Blanchard and *Sampson & Brown*, for appellee.

ROTHROCK, J.—I. Provision had been made for the erection of the courthouse by a vote of the people of the county, authorizing the expenditure of seventy-five thousand dollars for that purpose, and, by the written contract between the parties, the plaintiff undertook to furnish all the materials and erect the building for that sum. As has been said, the house was to be completed by May 1, 1883, and the contract contained the further provision that if it should not be completed by the first day of November, 1883, then the second party (the county) might employ the necessary workmen, purchase material and complete the work, and deduct the reasonable cost thereof from the amount which would otherwise be due the plaintiff. The plaintiff was to do the work according to certain plans and specifications, and under the direction of a superintendent of construction, whose determination as to quality of material and manner of workmanship should be final and conclusive between the parties. Payments were to be made upon monthly estimates made by the superintendent or architect, less ten per cent. to be retained until the completion of said building by the party of the first part in accordance with the terms of the contract. The plaintiff claims that he was without fault in failing to complete the building by the time stipulated in the contract, and that such failure occurred solely by reason of the wrongful and corrupt acts of the architect in making insufficient monthly estimates, in rejecting suitable material, and in fraudulently making second estimates, reducing and cutting down estimates that had been already allowed and paid; and that the failure to promptly pay the estimates actually made, and the

1. COUNTIES: contract for courthouse: in excess of amount voted: ultra vires.

various wrongful, fraudulent and corrupt acts of the architect, delayed the work and the completion of the building. As we have stated, the contract price for the erection of the building was seventy-five thousand dollars,—the full amount of money authorized by the vote of the people. The contract contained the following provision: "If any alteration should hereafter be made by order of the said party of the second part, varying from the said plans and specifications, either by adding thereto or diminishing therefrom, or otherwise, such alterations shall not vacate this contract; but the value thereof shall be estimated by said superintendent, and added to or deducted from the sum herein agreed to be paid for said building, as the case may be. Nor shall such alterations supersede the conditions for the completion of the whole or several parts of said building by the times hereinbefore provided." The first work done was the excavation for the foundation. The architect directed the deepening of the trenches beyond the plans adopted, for which he allowed the plaintiff over four hundred dollars. The deepening of the excavation made a corresponding increase in the height of the foundation wall necessary. The architect ordered the wall to be raised, for which he allowed seven hundred and seventy-seven dollars. After the foundation wall was put in according to the plans, the architect ordered it to be taken out, because it was thought to be not thick and solid enough to support the superstructure. A new and heavier wall, of different stone, was substituted, under an agreement that plaintiff should receive forty-six hundred and twenty dollars therefor. These additional expenditures were allowed and paid for, less the ten per cent. retained under the provisions of the contract. These items of extras would have increased the contract price for the building several thousand dollars above the seventy-five thousand authorized by the vote of the people. The defendant, by an amendment to its answer, set out the above sums as having been paid by the county for extra work, and made the following averments in relation thereto:

"Said sums were all illegally paid, and paid, in violation of law, on contracts made in excess of said seventy-five thousand dollars, and made after said original seventy-five thousand dollar contract had been made. Defendant asks that said sums be applied in payment of the amounts due on the original contract, and ask judgment for any balance that may be left, after so applying the said sums, as an offset."

It will thus be seen that one of the issues presented was whether these extras, and the subsequent contracts in relation thereto, were void as being in excess of the seventy-five thousand dollars authorized to be expended. The court instructed the jury in relation thereto as follows: "Under the law and the record of the vote of the electors of Mahaska county, its board of supervisors had power to erect a courthouse in the city of Oskaloosa, Iowa, and to make orders or contracts therefor, or in relation thereto, to the extent of an aggregate cost of seventy-five thousand dollars; but such board had no power to make orders and contracts for a courthouse the probable cost of which exceeded this sum. And if you find that the board, after making the written contract of date July 21, 1881, made supplemental or additional contracts or orders for changes, increasing the cost beyond seventy-five thousand dollars, the board exceeded its power, and such supplemental or additional contracts and orders are absolutely void, and do not bind the defendant; but in as far as you find any alleged subsequent contract for changes in said building, extension of time for its erection, or other purposes, in relation thereto, proven, whether the same was in writing or not in writing, if it had not the effect to increase the cost of the building above seventy-five thousand dollars, it was authorized, and binds defendant. Should you find that the plaintiff, under the supplemental contract of May 3, 1882, removed a part of the foundation, which he had constructed under the first contract of date July 21, 1881, and substituted a more expensive foundation, you should allow what is not shown to be paid for the first contract price of the foundation, or such part as the

plaintiff constructed thereof prior to his being put off of the building, but no more, for the first construction, its removal and the second construction." It will be observed from the extract from the contract above set out that the alterations contemplated not only adding to the price, but diminishing therefrom, and that such alterations should not vacate the contract. But the evidence does not show that any changes were at any time contemplated by the parties which would have the effect to diminish the cost from the plans adopted. The plaintiff claims that additional contracts or orders for changes were made, which increased the cost of the building more than ten thousand dollars in addition to the contract price of seventy-five thousand dollars. These additional contracts were clearly illegal and void. The law provides that a board of supervisors have no power to order the erection of a courthouse, where the probable cost will exceed five thousand dollars, without a vote of the people. In this case, the authority given by the vote authorized an expenditure of seventy-five thousand dollars. The plaintiff contracted to erect the building for that sum. He appears to have been an experienced contractor and builder. According to his own claim, some ten thousand dollars was added to the cost of the building, and contracts were made therefor before he completed the basement. This addition to the cost is founded upon illegal and void contracts, which he and the members of the board knew to be void, not as being charged with a knowledge of the law, but they knew as a fact that these contracts were illegal. The board adopted plans for building which, when completed, cost the county largely in excess of one hundred and fifteen thousand dollars. The county was compelled to vote an additional fifty thousand dollars for its completion. It is contended that this act of the people was a ratification of the illegal acts of the parties in making the contracts, by which the amount first authorized was exhausted. No such construction can be put upon the second vote of the people. It was a question with them whether they should lose the seventy-five thousand

dollars already expended, or complete and occupy the building. If we were to construe the law as we are asked to in this case, it would invite public officers and contractors to evade the positive requirements of the statutes by making contracts involving unlawful expenditures, and thus compel the people to increase appropriations made for such purposes. The thought that these additional contracts were not void, because the original contract contemplated changes by which the cost of the building would be decreased, cannot be material in this case. If such a thing as changes lessening the cost of a building was ever heard of before, it has no application here. The acts of the parties show that no such thing was intended. In our opinion, the court did not err in directing the jury that the additional contracts were void. *Reichard v. Warren County*, 31 Iowa, 381; *McPherson v. Foster*, 43 Iowa, 48; *Clark v. City of Des Moines*, 19 Iowa, 199.

II. A stipulation was made, after the action was commenced, by which the failure of the plaintiff to present his claim to the board of supervisors before the suit was commenced was waived. The plaintiff afterwards amended his petition, in which he set up an oral contract, alleged to have been made with the board of supervisors, in reference to the extra or void contracts. The court directed the jury that the claim based on this oral contract was not embraced in the stipulation. This ruling of the court is claimed to be erroneous. If the oral contract had been valid, the position of counsel would probably be correct. But the amendment claimed relief upon a contract which was illegal and void, and the instruction complained of was not prejudicial to any legal right of the plaintiff.

2. INSTRUCTION: error without prejudice.

III. We come now to what we regard as the material question in the case. It appears from the evidence that the work done under these additional and void contracts was paid for in the estimates made by the architect. It is claimed that the sums so paid cannot be recovered

3. COUNTIES: ultra vires contract: payment: conclusiveness.

back. We are cited to the case of *Long v. Boone County*, 36 Iowa, 60, as sustaining the claim made by counsel. It was held in that case that "when the legally constituted agent of the county contracts for work in respect to which he has no power unless authorized by a special vote of the people, and executes a warrant for the amount thereof on the treasurer of the county, which is voluntarily paid by the latter officer, the county cannot recover back the amount so voluntarily paid." Conceding all that is involved in that case, yet we think there was no such payment in the case at bar as to bring it within the rule contended for. If so, the law limiting expenditures by boards of supervisors might constantly be evaded. All that would be required would be the making of a contract authorized by law, and then make additional illegal contracts, pay off the work done under the latter contracts, and leave the county without remedy. The action in the case at bar was brought for a large sum of money. It involved all of the transactions between the parties, based upon the several contracts. When all the pleadings are considered, the defendant was not in the attitude of seeking to recover back money paid to the plaintiff on these illegal contracts. The claim made that the contracts were illegal grew out of the same transactions upon which the plaintiff based his right to recover. We do not think that the defendant, upon the facts disclosed, should be denied the right to insist that the additional contracts were illegal.

IV. Exceptions were taken by plaintiff to some other instructions given by the court to the jury. The whole scope of the charge was to the effect that recovery could only be had upon the basis of a completed building for the original contract price of seventy-five thousand dollars. We fail to discover any prejudicial error in the instructions. Those relating to the authority given by the contract to the architect to determine the quality of material, and the amount of

4. ——: contract for courthouse: void changes: failure to complete: recovery.

the progressive estimates, appear to be correct. Complaint is made that the ten per cent. of the estimates which the defendant was authorized by the contract to withhold to insure the completion of the building was treated by the court as a forfeiture in case the plaintiff was in fault in failing to finish the building according to his contract. The defendant, by its contract, reserved the right to take possession of the work, and complete the building, in case of plaintiff's failure to comply with his contract. The evidence shows without question that more than the original contract price was exhausted, and the building was not then completed. This being the fact, the plaintiff was not entitled to any of the ten per cent. retained. His legal obligation was to complete the building for seventy-five thousand dollars.

There are other objections made to the rulings of the court during the trial. We have disposed of such of them as we thought ought to be specially mentioned. We find no ground for disturbing the judgment of the district court.

5. APPEAL: practice: cost of additional abstract.

Complaint is made by the plaintiff's counsel because of an additional abstract filed by defendant, which, it is claimed, was unnecessary to a determination of the questions involved. This additional abstract is an abstract of all the evidence. It was filed by counsel upon the claim made that the evidence shows without conflict that the plaintiff has been paid the full amount to which he is entitled under the contract, as construed by the district court. It does not appear that this claim is not made in good faith, and, under the circumstances, we do not think the cost of said abstract should be taxed to the defendant. The judgment of the court below is

AFFIRMED.

LOWERY V. GREENE COUNTY.

Judgment: IN ACTION AT LAW: SETTING ASIDE IN EQUITY. Judgments in actions at law cannot be annulled or modified in equity, except for causes arising or discovered subsequent to their rendition. (Code, sec. 2522). And so, where plaintiff brought an action on account against defendant, but, pending the trial, elected to dismiss it, but the clerk by mistake entered a general judgment against him, and he had no knowledge of such mistake until the judgment so entered was pleaded as a bar to a second action on the same account, and such defense was held good, and judgment was therefore rendered against him in the second action, *held* that a court of equity could not pronounce the last judgment a nullity, but that it must be regarded as a final adjudication of the claim.

Appeal from Greene District Court.—HON. J. P. CONNER, Judge.

FILED, OCTOBER 4, 1888.

ACTION in equity to cancel certain judgments. The petition also contained a general prayer for relief. The district court sustained a demurrer to the petition, and, plaintiff refusing to amend, judgment was entered against him, and he appeals.

Cole, McVey & Clark, for appellant.

John J. Russell and *Z. A. Church*, for appellee.

REED, J.—The petition alleges that plaintiff, who is a physician, rendered professional services and furnished medicines for certain poor persons, under an employment by the township trustees of the township in which said persons resided; that his bill for such services was allowed by the trustees, and afterwards presented to the board of supervisors for payment, and payment thereof refused; that plaintiff thereupon instituted a suit before a justice of the peace against

the county on said claim, which was tried, and judgment was rendered against him; that he took an appeal to the circuit court, where the cause came on for trial at the October term, 1884; that in the progress of the trial the court ruled that the certificate of the trustees allowing the account was insufficient, and excluded it; that plaintiff thereupon elected to dismiss the action without prejudice, and the judge announced that such order would be made, but the clerk, in entering up the record, by mistake and omission, entered a final judgment against the plaintiff; that plaintiff then procured a proper certificate of the township trustees approving and allowing his claim, and presented the same to the board of supervisors for payment, but the board again refused to pay it; that he then brought suit thereon, and on another claim which he held against the county, in the circuit court, the claims being pleaded in separate counts; and that the county, among other defenses, pleaded the judgment entered by the clerk in the former action in bar of the action on said account; that upon the trial, which took place at the October term, 1885, after all the evidence was introduced, the defendant moved the court for judgment on the count in which said claim for services was pleaded, which motion the court sustained; that the claim pleaded in the other count of the petition was duly submitted to the jury, who returned a verdict thereon for defendant, upon which judgment was entered. It is also alleged that plaintiff had no knowledge that the clerk had entered up a final judgment against him upon the first trial until the record was introduced in evidence on the second trial. Copies of all of the pleadings in both causes, and the record entries therein, are attached as exhibits, and made part of the petition. The special relief demanded is that the final judgment entered by the clerk at the October term, 1884, be cancelled and set aside; that the judgment entered at the October term, 1885, be adjudged to be a nullity; and that judgment be entered for plaintiff for the amount of his claim. The ground of the demurrer is that the petition shows

that the claim has been fully adjudicated. We think the demurrer was properly sustained. The judgment rendered at the October term, 1885, is not a nullity, and it must be regarded as a final adjudication of the claim. While the court sustained the motion for judgment on the count in question before submitting the other count to the jury, no judgment was in fact entered until after the verdict on that count was returned. The judgment entered is in form a general judgment against plaintiff. The case upon the record is in the same position it would have occupied if the court, while submitting the one count to the jury, had directed them specially to find for defendant on the other count, and had entered judgment upon the verdict returned in obedience to that direction. In sustaining the motion, the court held, in effect, that upon the undisputed evidence plaintiff was not entitled to recover on that count, and that is what would have been determined if the jury, in obedience to the direction of the court, had returned the same verdict. So that the judgment is based upon the finding of the court upon the motion as well as upon the verdict of the jury on the other count, and is a final adjudication of all the issues in the case. The court may have erred in its practice, but the judgment is not void for that reason. The subject-matter and the parties were within the jurisdiction of the court, and the order sustaining the motion, and entering judgment on the finding, were made by it in the exercise of that jurisdiction. The proper remedy for an error in such case is by appeal. A court of equity has no power to treat the order and judgment as a nullity. "Judgments obtained in an action by ordinary proceedings [which was the character of the action in which the judgment was rendered] shall not be annulled or modified by an order in an action by equitable proceedings except for a defense which has arisen or been discovered since the judgment was rendered." Code, sec. 2522.

AFFIRMED.

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78	163
75	341
86	641
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87	248
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91	659
75	341
92	295
75	341
100	722
75	341
103	644

HEFFNER v. BROWNELL.

1. **Appeal**: PRACTICE: REVIEWING DECISION ON PRIOR APPEAL. This court will not, on a second appeal, review or reverse a decision made on a prior appeal of the same case. (*Adams County v. Burlington & M. R. Ry. Co.*, 55 Iowa, 94, *followed*).

2. **Promissory Note**: PARTIES BOUND: PAROL. Parol evidence is inadmissible to show that it was the intention of all the parties to a promissory note that only one of the signers should be bound thereby, when the note itself clearly expresses the undertaking of the parties.

Appeal from Buchanan District Court.—HON. J. J. NEY, Judge.

FILED, OCTOBER 4, 1888.

ACTION on a promissory note, of which the following is a copy:

"INDEPENDENCE, Iowa, July 18th, 1884.

"One year after date, value received, we promise to pay Daniel Heffner, or bearer, two hundred dollars, with eight per cent. from date until paid. Payable at Independence, Iowa, with reasonable attorney's fees if sued. If interest is not paid when due, it shall draw interest at eight per cent.

"INDEPENDENCE MFG. CO.
"B. S. BROWNELL, Pres.
"D. B. SANFORD, Sec'y."

Defendant Brownell filed a demurrer to the petition, which being sustained, the cause was brought, upon appeal, to this court, and the judgment was reversed. See 70 Iowa, 591. Defendant then filed an answer, in which he alleged that the instrument sued on is the note of the Independence Manufacturing Company alone; that it was given for an indebtedness of that company to plaintiff, and was executed under the seal of said company, which is a corporation; that defendant was president and D. B. Sanford was secretary of the

company, and it was their duty, under its by-laws, to execute in its name all contracts entered into by it; that, in pursuance of that authority, they signed the note, intending to bind the company only, which facts were well known to plaintiff at the time, and that he accepted it with the understanding that the company alone was to be bound. Plaintiff demurred to the answer, and, the demurrer being overruled, he electing to stand on his demurrer, judgment was for defendant for costs, from which judgment he appeals.

Woodward & Cook, for appellant.

Lake & Harmon, for appellee.

REED, J.—I. On the former appeal we held that "the note purports on its face to be the note of all the persons, including the corporation, who executed it." The correctness of that holding has been questioned on this appeal, and numerous authorities have been cited with which it is claimed by counsel to be in conflict. But the settled rule is that we will not on a second appeal review or reverse the decision made on the former appeal. *Adams County v. Burlington & M. R. Ry. Co.*, 55 Iowa, 94. The holding is therefore the law of the case.

II. The only other question in the case is whether extrinsic evidence would be admissible to show the intention of the parties. There is no ambiguity in the language of the contract, but it clearly expresses the undertaking of the parties. The almost uniform holding of the authorities is that in such cases parol evidence of the intention of the parties is not admissible. The holding of many of the cases cited by appellee on the first proposition is to that effect. *Scanlan v. Keith*, 102 Ill. 634; *Draper v. Mass. Steam Heating Co.*, 5 Allen, 338. We think the demurrer should have been sustained.

REVERSED.

THE MCCORMICK HARVESTING MACHINE CO. v. GATES *et al.*

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1. **Will:** CONSTRUCTION: LIFE ESTATE: ALIENATION RESTRICTED. The will in question stated that the testator had placed his son on certain land, and that he was to occupy and enjoy it during his natural life. *Held* that this was a devise to the son of a life estate, and that the right of the devisee to alienate it, and of his creditors to subject it to the payment of their demands, could not be restricted by subsequent provisions of the will; but that such provisions were void because inconsistent with the estate devised. (See opinion for authorities).

2. **Execution:** SUPPLEMENTARY PROCEEDINGS: FOUNDATION. The return of an execution *nulla bona* is a good foundation for a proceeding in equity to ascertain defendant's interest in real estate and to subject it to the payment of the judgment.

Appeal from Jasper District Court.—HON. D. RYAN, Judge.

FILED, OCTOBER 4, 1888.

ACTION in equity to subject certain real estate to the payment of a judgment against the defendant A. C. Gates. There was a demurrer to the petition, which was sustained, and, defendants electing to stand thereon, the relief asked by plaintiff was granted.

Alanson Clark, for appellants.

Kerr & McElroy, for appellee.

SEEVERS, C. J.—The plaintiff obtained a judgment against the defendant A. C. Gates, and in this action seeks to subject certain real estate, which said Gates has a title to, or interest in, to the payment of said judgment. Whatever right or interest A. C. Gates may have in the real estate was derived under the will of E. M. Gates, and it is as follows: "I have placed my son Alvin C. Gates on a

1. WILL: construction: life estate: alienation restricted.

farm near Colfax, in said county, described as the southwest quarter and the north half of the southeast quarter of section eleven, township seventy-nine, range twenty-one, situated in said Jasper county, state of Iowa, which it is my will that he occupy and enjoy during his natural life, but without the power or ability to convey or incumber the same, and that its productions and rents are intended by me to insure a support for himself and his family; and it is not my will that he have the power to mortgage or incumber the rents, profits or productions of said farm, either above or under ground, or that the same be subject to attachment or levy for the debts of said Alvin. It is my will that he have such an estate as will allow of his farming the same himself or renting to others, or as will allow him to mine the coal that is supposed to be under it, or contract with others to mine it, so that nothing is done which will allow the income from the same to escape from the said Alvin or his said family. And it is my will that, upon the decease of said Alvin, the title to said land descend to Glen Gates, daughter of said Alvin, if she is the only child of his then living, or jointly to said Glen and any other child or children that may be born to said Alvin, to share and share alike; and it is my will that if no children of said Alvin are living at the time of his decease, that then and in that case the title in fee-simple to vest in my sons, Sumner E. and Lorin A. Gates, and, if they are not living, in their legal representatives." The question to be determined is whether A. C. Gates has such an interest in the land as can be alienated or sold on execution for debts created by him. It is stated in the will that the testator had placed A. C. Gates on the land, and he was to "occupy and enjoy it during his natural life." Conceding that there is no qualifying provision in the will, this is a devise of a life estate. 2 Jarm. Wills [5 Ed.] 404; 2 Washb. Real Prop. [3 Ed.] 450; *Reed v. Reed*, 9 Mass. 372; *Blanchard v. Brooks*, 12 Pick. 63; *Lewis v. Palmer*, 46 Conn. 460; *Bowman v. Pinkham*, 71 Me. 295. But such devise is coupled with conditions; it being provided

that A. C. Gates shall not convey, nor incumber the land or the rents and profits, nor shall the same be subject to attachment or levy for the debts of said A. C. Gates. Counsel for the appellee insist that, as a life estate is vested in A. C. Gates, the provision against the alienation by him or through judicial process is void, because it is inconsistent with the estate vested in him; that is to say, the argument is, if a person is vested with an estate for life or in fee-simple of real estate, he must necessarily be vested with the right to alienate such estate, and that such right cannot be in any respect controlled. If the power to alienate is restricted, the estate ceases to be an absolute one, whether it be for life or in fee-simple. In this respect there is no difference in the two estates; both are absolute, or neither exists. The authorities, without serious conflict, except as hereafter indicated, are in accord upon this subject, and sustain the views above expressed. 2 Jarm. Wills [5 Ed.] 538; 1 Perry, Trusts, sec. 386; *Blackstone Bank v. Davis*, 21 Pick. 42; *Deering v. Tucker*, 55 Me. 284; *Keyser's Appeal*, 57 Pa. St. 236; *McCleary v. Ellis*, 54 Iowa, 311. We have doubts whether any adjudged case can be found which holds otherwise, unless the legal title to the property has been vested in a trustee, for the use, under specified conditions, of the beneficiary. Many such cases have been cited by counsel for the appellants, but they are clearly distinguishable, unless it can be said that under the will in question a trust estate was created. But it is too clear for controversy, we think, that a life estate was vested in A. C. Gates. He could not hold such estate in trust for himself. The two estates are inconsistent, and cannot exist in the same person at the same time. In fact, the will does not create a trust estate, but vests an estate for life in A. C. Gates.

The petition states that an execution was issued on the judgment and returned "No property found." This, being admitted by the demurrer, constitutes a sufficient basis for and warrants this proceeding in equty to determine the nature

2. EXECUTION: supplementary proceedings: foundation.

and extent of the estate of A. C. Gates in the property in controversy. The demurrer was properly overruled, and the judgment of the court subjecting the life estate to the payment of the judgment must be

AFFIRMED.

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SCARTH *et al.* v. THE SECURITY MUTUAL LIFE SOCIETY.

Life Insurance: PROVISION AGAINST SUICIDE: CONSTRUCTION. The life insurance policy declared on in this case provided that if the assured should commit suicide, "felonious or otherwise, sane or insane," the policy should be void. The assured did commit suicide while temporarily insane from illness, and when he was in no manner conscious or responsible. *Held* that no recovery could be had on the policy. (See opinion for authorities).

Appeal from Jasper District Court.—HON. J. K. JOHNSON, Judge.

FILED, OCTOBER 4, 1888.

ACTION on a life insurance policy. A demurrer to the petition was sustained, and plaintiffs appeal.

Winslow & Varnum, for appellants.

No appearance for appellee.

ROTHROCK, J.—I. It appears from the averments of the petition that on the fifth day of December, 1885, the defendant issued to Francis O. Scarth a policy of insurance upon his life, or a beneficiary certificate, in the amount of three thousand dollars, and that until the twenty-eighth of February, 1886, he complied with all the conditions and agreements contained in said contract of insurance, when he died; and that the plaintiffs are the beneficiaries named in said policy. The manner of the death of the insured is stated in the petition in these words: "That on the twenty-eighth day of February, A. D., 1886, said Francis O. Scarth departed this life, he having committed suicide by

shooting himself in the head, and death resulting immediately therefrom; that said act of suicide was made and committed while said Francis O. Scarth was temporarily insane, such insanity being the direct result of continued illness of some weeks, and a lowness of spirits occasioned thereby, and that in so doing he, the said Francis O. Scarth, was entirely unable to control himself, and such act was occasioned by such insanity, and about and over which the said Francis O. Scarth was in no manner conscious or responsible." The beneficiary certificate is exhibited with and made part of the petition, and it provides that, "if the member shall commit suicide, felonious or otherwise, sane or insane," the policy shall be void. One ground of the demurrer was based upon this clause of the policy, in connection with the averments of the petition with reference to the death of the insured. This clause in the policy presents the principal question in the case.

There has been much discussion in adjudged cases as to the effect of conditions in life insurance policies, which provide that the policy shall be void if the assured comes to his death by his own hand. At one time policies provided, generally, that they should be void in case of death by "suicide," or by "one's own hand," without more. It was held that these terms were synonymous, and conveyed the same idea. It has been held quite generally by the courts of this country that this general condition in a policy referred to an act of criminal self-destruction, and did not apply to an insane person who took his own life. *Life Association v. Waller*, 57 Ga. 533; *Hathaway v. Ins. Co.*, 48 Vt. 335; *Ins. Co. v. Graves*, 6 Bush, 268; *Newton v. Ins. Co.*, 76 N. Y. 426; *Scheffer v. Ins. Co.*, 25 Minn. 534; *Ins. Co. v. Terry*, 15 Wall. 580; *Ins. Co. v. Rodel*, 95 U. S. 232; *Ins. Co. v. Isett*, 74 Pa. St. 176; *Ins. Co. v. Moore*, 34 Mich. 41; *Eastabrook v. Ins. Co.*, 54 Me. 224. This being practically the settled law applicable to these conditions, insurance companies adopted a more specific condition as to liability in cases of death by suicide, and there are a number of cases where the language of the

policy is substantially the same as that employed in the policy under consideration. In *Bigelow v. Ins. Co.*, 93 U. S. 284, the condition in the policy was that it should be void if the insured "shall die by suicide, sane or insane." In an action on the policy the defendant pleaded that the insured died from the effect of a pistol wound inflicted upon his person by his own hand, and that he intended by this means to destroy his life. The plaintiff by reply, pleaded that the insured, when he inflicted the pistol wound upon his person by his own hand, was of unsound mind, and wholly unconscious of the act. It was held that a demurrer to the replication was properly sustained. The effect of the holding was that the policy was void, notwithstanding the self-destruction was accomplished at a time when the insured was wholly unconscious of the act. There is no substantial difference between that case and the one now under consideration. In *Streeter v. Life and Accident Soc.*, 65 Mich. —, the policy provided that it should be void if the insured should "die by his own hand, sane or insane." The insured died from the effects of a pistol-shot wound inflicted by himself. The evidence tended to prove that when he shot himself he was insane. Witnesses expressed the opinion that his mental condition was such that he was unable to control any of his physical actions that might have been called upon to carry out any one of his impulses. It was held that the insurance company was not liable upon the policy. In support of the rule announced by these cases, see, also, *Pierce v. Ins. Co.*, 34 Wis. 389; *Salentine v. Ins. Co.*, 24. Fed. Rep. 159; *Riley v. Ins. Co.*, 25 Fed. Rep. 315; *Adkins v. Ins. Co.*, 70 Mo. 27; and *Penfold v. Ins. Co.*, 85 N. Y. 317. In some of these cases language is employed which would seem to indicate that, if the insured was not at the time conscious of the physical nature and consequences of the act, the policy might not be void. We think, however, that the better rule, and the logical conclusion of all the above cited cases, is that the condition in the policy was intended to include self-destruction, no matter what the mental condition of

the insured was at the time of the act which caused the death. Of course, the policy never was intended to include death by accident, as by taking poison by mistake, the accidental discharge of a gun or pistol held in the hands of the insured, or the like. It means all suicidal acts, whether such as are denominated as criminal, or such as are the offspring of insanity. We have not had a brief or argument by counsel for appellee in this case, and have been compelled to make somewhat of an examination of that side of the question without these aids, and our conclusion is that the demurrer to the petition was properly sustained. This disposition of the case renders an examination of the other grounds of demurrer unnecessary. AFFIRMED.

SCHAFER V. SCHAFER *et al.*

1. **Equity**: JURISDICTION. An action to enforce an equitable lien is properly brought as an action in equity.

2. **Mortgage**: RIGHT OF WAY OVER PREMISES: WHO ENTITLED TO DAMAGES. Where the mortgage debt remains unpaid, and the land is not sufficient to pay it, and the mortgagor is insolvent, the mortgagee has, as against the mortgagor, a lien on the damages awarded for right away over the premises. (See *Sawyer v. Landers*, 56 Iowa, 422). And in such case, where the mortgagee assigned his mortgage, but reserved his right to the damages, and the mortgagor assigned his equity in the land, and the mortgage was foreclosed and the land exhausted, leaving a balance of the judgment unpaid, which balance was then assigned to the mortgagee, *held* that he was still entitled to the damages as against all parties, to be applied on the unpaid portion of the judgment.

Appeal from Wapello District Court.—HON. H. C. TRAVERSE, Judge.

FILED, OCTOBER 4, 1888.

ACTION in chancery to establish and enforce a lien claimed by plaintiff upon funds in the hands of one of

the defendants. There was a decree granting the relief prayed for by plaintiff. A part of the defendants appeal.

D. C. Beaman and *S. E. Adler*, for appellants.

McNett & Tisdale, for appellee.

BECK, J.—I. There is no controversy as to the facts in the case, which, briefly stated, are these: The plaintiff, being the owner of two town lots, sold them to his brother Ludwig, who is a defendant in this action, and executed to him a title bond, with conditions of forfeiture in case of non-payment, and an obligation by the plaintiff to convey the lots upon the payment of the purchase money, for which Ludwig executed his promissory notes. The Chicago, Milwaukee & St. Paul Railway Company, which is made a defendant, instituted condemnation proceedings in order to acquire the right to lay its track on a street upon which the lots abut. The plaintiff and his brother Ludwig were both made parties to the proceedings. Damages upon an appeal were finally awarded by judgment against the railroad company, but the rights of plaintiff and Ludwig were not determined, but held for future settlement. Plaintiff declared the bond forfeited for a breach of its conditions, and conveyed the property to Hill, by a warranty deed, for a consideration greater than the price agreed to be paid by Ludwig, and Hill conveyed it by warranty deed to Ladd & Harrow. Plaintiff reserved in his deed to Hill the damages recovered or to be recovered from the railroad company. Hill's deed to Ladd & Harrow recited this reservation. Ladd & Harrow brought an action against Ludwig to recover the possession of the lots, but upon demurrer it was held that the right to declare the bond forfeited had been waived by plaintiff. They then brought suit against plaintiff for breach of warranty of his deed, which was settled by plaintiff's assigning to them the title bond and the notes executed by Ludwig, reserving an interest therein equivalent to

the amount of the damages to be finally recovered against the railroad company in the condemnation proceedings. Of this transaction defendant had no notice. Ladd & Harrow amended their petition in the action brought to recover possession of the lots, and thereby asked a foreclosure of the title bond, showing its assignment to them. Ludwig and wife assigned to Beaman & Adler all their right and claim to the railroad damages. Ladd & Harrow recovered judgment in their action on the title bond, upon which the property was sold and purchased by them. The balance of the judgment, remaining unpaid, was assigned by Ladd & Harrow to plaintiff. Upon these facts plaintiff claims that the railroad damages in equity should be applied on this judgment, and seeks in this action to enforce this right, claiming that he holds an equitable lien upon the money paid in satisfaction of the damages, which is in the hands of the sheriff, who is a party to this action. The district court, by decree, granted and enforced the relief prayed for by plaintiff.

II. Defendants insist that the district court erred in overruling a motion to transfer the cause to the law docket. We think the cause is one of equitable cognizance, in view of the fact that plaintiff seeks to enforce an equitable lien. It was rightly brought and prosecuted in chancery.

III. In order to determine the rights of plaintiff, we will consider briefly the relations between him and the other parties to the action. (1) The relation between plaintiff and Ludwig is that of mortgagor and mortgagee. This is the settled doctrine of this court. (2) Beaman & Adler are the only defendants who claim the railroad damages against plaintiff. They are assignees of Ludwig. The other parties, the railroad company and the sheriff, take no part in the contention, and are indifferent as to the success of the other parties. The case, then, is a contest between a mortgagee and the assignee of the mortgagor as to which party shall recover the damages assessed in an *ad quod damnum* proceeding. While the mortgage debt remains unpaid,

and the land is not sufficient to pay the mortgage debt, and the mortgagor is insolvent, which is the case in this action, there can be no doubt that the mortgagee, as against the mortgagor, has a lien upon the judgment or claim for damages. Indeed, this lien is superior to that of an attaching creditor. *Sawyer v. Landers*, 56 Iowa, 422.

IV. What effect, if any, did the conveyances by plaintiff to Hill, and Hill to Ladd & Harrow, have upon the rights of plaintiff and his lien? We think none whatever, for two reasons: The conveyances passed no title as against Ludwig, and the parties so recognized the fact by proceeding to foreclose. But, assuming that they did, it does not follow that this defeats plaintiff's claim and lien. The grantees, Hill and Ladd & Harrow, did not succeed to plaintiff's right to the railroad damages, for such right was expressly reserved by plaintiff. They did not and could not make any objection to plaintiff's enforcing his right thereto. Ludwig, as we have seen, had no right to these damages. Surely he cannot object to the plaintiff and his grantees or assignees disposing of these damages by agreement. So under the proceeding of foreclosure brought by Ladd & Harrow, no objection can be raised by Ludwig that, by the agreement of the parties, the damages are reserved to plaintiff. Ludwig was not entitled to them. They go to the mortgagees, or their representatives or assigns. Ladd & Harrow stand as the assignees of the mortgagee, the plaintiff. They enforce their claim as mortgagees. But by an arrangement between them and plaintiff he is to take the railroad damage money. This does not affect Ludwig's right, for he had no claim to the damages. Nor can his assignees, Beaman & Adler, complain, for they stand in his shoes, and have no higher or better right than he held.

V. Beaman & Adler claim that, if the court holds that they are not entitled to the railroad damages as assignees, they are entitled to recover one hundred dollars thereof as attorney fees for prosecuting the case and recovering the judgment. But the firm of which one of

these attorneys was a member was paid for his services, and the other attorney did not appear for plaintiff, but for Ludwig. It does not appear that he holds any lien against plaintiff. These considerations dispose of the controlling questions in the case. We think the decree of the district court ought to be AFFIRMED.

LYMAN v. PLUMMER *et al.*

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Cities and Towns: NOTICE OF SPECIAL ASSESSMENTS: WHAT SUFFICIENT. When notice of a special assessment on city property to pay for street improvement is necessary to be given to the respective owners, and the city has provided by ordinance for giving such notice by publication in a newspaper of general circulation published in the city, notice given in accordance with the provisions of such ordinance is sufficient, and personal notice is not required. (See opinion for citations).

Appeal from Pottawattamie District Court.—HON. H. E. DEEMER, Judge.

FILED, OCTOBER 5, 1888.

ACTION in equity to restrain the collection of a special assessment on real estate owned by the plaintiff, made by the city of Council Bluffs. The relief asked was granted, and the defendants appeal.

G. A. Holmes, for appellants.

F. M. Hunter, for appellee.

SEEVERS, C. J.—The plaintiff is a resident of and the owner of real estate in the city of Council Bluffs. Since the taking effect of chapter 20, Acts Twentieth General Assembly, the city of Council Bluffs passed an ordinance providing for the assessment and collection of special assessments made by the city to pay for improving the streets, and making the same liens on abutting real estate. The ordinance provided that the city council, when the work has been done, and assessments

made to pay therefor, shall "pass a resolution containing a correct description of the property, lot, block, or parcel of land, and street, and state when the improvement was made, the kind, and cost of the same, and amount chargeable to each lot or part of lot, which said resolution shall be published three times successively in some daily newspaper of general circulation published in said city, and any owner or owners aggrieved, or having any objection to said special assessment against his or their property as aforesaid, shall, within ten days from the date of the last publication, file with the city clerk any written objections he or they may have" to such improvements and special assessments. Such a resolution was duly passed, and published as provided in the ordinance, and in the publication the plaintiff was named and designated as "probable" owner of the real estate described in the petition. No notice other than the publication of the resolution for the required length of time was given to or served upon the plaintiff. The amount in controversy being less than one hundred dollars, we are required to determine such questions only as have been certified to us by the trial judge, one of which is as follows: "Is the notice, published by resolution, as provided by the ordinance, sufficient notice to the resident property-owners, and is it sufficient notice to give resident property-owners an opportunity to be heard before the special assessment complained of was made, taking into consideration the fact that the city of Council Bluffs is organized under the general incorporation law?" In considering this question it must be assumed that a notice of some kind was essential, and without it the tax is invalid. It is not claimed that the notice published was in any respect insufficient, except that it was not served personally on the plaintiff. The power of the city to make the improvement in question is not denied, and the power is expressly conferred upon it to provide, by an ordinance, the mode in which the charge on the respective owners of real estate shall be assessed. Code, sec. 478. There is no statute which requires a personal notice, nor is

there a statute which requires any notice, to be given. That it is competent for the general assembly to prescribe the kind of notice, whether personal or by publication in a newspaper, cannot, we think, be doubted. It was so held in *Stuart v. Palmer*, 74 N. Y. 183. See, also, *Macklot v. City of Davenport*, 17 Iowa, 379; *Henkle v. Town of Keota*, 68 Iowa, 334. No case has been cited which holds that personal notice is required, and we do not think any well-considered case can be found which so holds. We shall assume that it would have been competent for the general assembly to provide that such a notice as was published was sufficient. When the power was conferred on the city to prescribe, by an ordinance, the mode or manner in which the charge for the improvement should be made, it embraced the right on the part of the city to do all things necessary to make the assessment a valid charge against the owners of property abutting on the streets. By necessary implication, the power was conferred on the city to prescribe the notice that should be given. In this respect the city was vested with all the powers vested in the general assembly, and, if it was competent for the general assembly to provide that a notice by publication should be given, such power, by necessary implication, was conferred on the city. If the city had provided that personal notice should be given, and this had been done, its sufficiency could not have been doubted. This being so, it follows that the city could provide that a notice by publication should be given, and the force and effect of both must necessarily be the same. The foregoing question must be answered in the affirmative. It is unnecessary to determine the other questions certified.

REVERSED.

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PURDY V. THE CITY OF INDEPENDENCE.

1. **Cities and Towns: OFFICERS: COMPENSATION: ALTERATION BY CONTRACT DURING TERM.** Under section 491 of the Code, which provides that the compensation of no city officer shall be increased or diminished during his term of office, it is incompetent for a city treasurer to bind himself by contract with the city council to perform certain duties of his office for a less compensation than is provided by the ordinances in force when he entered upon his office; and such contract is no bar, after the services have been rendered, to a recovery of the compensation provided by ordinance.

2. ———: **TREASURER: COMPENSATION FOR COLLECTING MONEYS: MEANING OF "COLLECTING."** The ordinances of the defendant city provided that the treasurer should have, as part compensation, one per cent. on all collections made by him, except on moneys received from the county treasurer, for which he was to have no compensation. The city, through its mayor, negotiated certain of its bonds through certain brokers, and the treasurer received the money derived therefrom. *Held* that such money was collected by him within the meaning of the ordinance, and that he was entitled to his percentage thereon

Appeal from Buchanan District Court.—HON. J. J. NEY, Judge.

FILED, OCTOBER 5, 1888.

PLAINTIFF was treasurer of the defendant city from March, 1886, to March, 1887. He brought this action to recover the compensation allowed by the ordinances of the city for collecting and disbursing certain moneys belonging to the city, which came into his hands during his term of office. The district court, at the close of the evidence, directed a verdict for plaintiff, and entered judgment thereon. Defendant appeals.

A. M. Shellito, City Solicitor, and *E. E. Hasner*, for appellant.

C. E. Ransier, for appellee.

REED, J.—When plaintiff was elected to the office of city treasurer, the following ordinances were in force:

"Chapter IX. * * * Sec. 16. That the treasurer shall, before entering upon the duties of his office, execute a bond to the city in the sum of five thousand dollars. He shall collect, receive and safely keep, all moneys due or belonging to the said city, and for any sum of money so received shall execute duplicate receipts, one of which shall be delivered to the person from whom such sum shall be received, and the other returned to the city clerk. * * *"

"Sec. 18. The treasurer shall be *ex officio* the collector of the city, and shall perform all the duties required by law or ordinance to be performed by the city collector."

"Chapter VII. Sec. 5. The city treasurer shall receive as compensation one per cent. on all collections made by him, and also one per cent. on all disbursements made by him from the city treasury; provided that, for all moneys received by him of the county treasurer, he shall receive no compensation."

The city negotiated its bonds to the amount of forty thousand dollars, for the purpose of raising the necessary money for the erection of a system of water-works. The arrangements for the negotiation of the bonds were made by the mayor with a firm of brokers in Chicago, but the moneys derived therefrom were paid over to plaintiff, who kept and disbursed the same to the contractors who did the work for the city. And his claim is for the compensation provided by section 5, chapter 7, for collecting and disbursing that amount of money. Before the bonds were negotiated, plaintiff signed and delivered to the city a writing, by which he agreed to accept as full compensation for receiving and disbursing the moneys which should be derived therefrom the sum of fifty dollars. Afterwards, however, but before the bonds were negotiated, he gave a written notice to the city council that he would decline to accept any

other compensation for his services than that provided in the ordinance. But before that notice was received by the council that body adopted a resolution allowing the treasurer fifty dollars for receiving and disbursing the money to be derived from the sale of the bonds. The record of the council, however, does not show that the ayes and noes were called in the passage of the resolution. The city afterwards offered to pay said sum of fifty dollars, but plaintiff refused to accept that amount.

I. It was contended by counsel for plaintiff that, owing to the failure of the council to call the ayes and noes on the passage of the resolution, which was the only action taken by that body, looking towards the acceptance of plaintiff's offer, the arrangement was not consummated in the manner provided by law, and consequently it never had the force and effect of a contract. But, in the view we take of the case, this question need not be gone into, and for the purpose of the case it will be conceded that a contract, whereby plaintiff agreed to accept, and defendant to pay, fifty dollars, as full compensation for the services, was regularly entered into. It will also be conceded that the subsequent attempt by plaintiff to terminate the arrangement was without effect. It is entirely clear, we think, that but for the contract plaintiff would be entitled to the compensation provided by the ordinance for disbursing the money. The language of section 5, chapter 7, is "on all disbursements made by him from the city treasury." By no possible construction can this language be limited to the ordinary revenues of the city, and it was plaintiff's duty, under the other ordinances quoted, to receive and safely keep it; and when paid out upon the proper order of the council it was disbursed from the city treasury within the meaning of section 5, chapter 7. The question as to the defendant's liability for that amount depends entirely, then, upon whether it was competent for the parties to fix, by contract, the compensation which should be paid for the services, and

1. CITIES and towns: officers: compensation: alteration by contract during term.

we are of the opinion that the effect of section 491 of the Code is to absolutely prohibit the parties from entering into any contract upon the subject. The provision is as follows: "The emoluments of no officer whose election or appointment is required by this chapter shall be increased or diminished during the term for which he shall have been elected or appointed." It may be conceded that one (and perhaps the principal) object which the general assembly had in view when the statute was enacted was to prohibit the city council from changing, by its own action, the compensation of a city officer, during his term of office, through motives of favoritism, or the opposite. But its effect is much broader than that. The evils which might result, if the compensation of an officer, which was fixed at the time of his election, could afterwards be changed by contract, would be as great as those which would follow if the council had power to increase or diminish such compensation at their own will. And one object of the enactment was to prevent such evils. The language is general, and absolutely prohibitive of any increase or diminution by any means whatever. It was insisted, however, that plaintiff rendered the services under the contract, and as a consequence he is entitled to no compensation whatever, if it was unlawful. But that position cannot be maintained. It assumes that the services were performed in pursuance of the contract. But that is not the fact. The performance of the services was imposed upon plaintiff by the ordinance as a duty of his office, and it was performed in obedience to that requirement. The contract had no relation to the performance of the duty, but had reference alone to the amount of compensation which should be paid for the services.

II. The judgment awards plaintiff compensation for the collection of the money, as well as for disbursing it, and it was contended that in that respect it is erroneous, even though the contract should be held illegal. The position of counsel is that the mere receiving of the money from the broker was not the collection of it,

2. —: treasurer: compensation for collecting moneys: meaning of "collecting."

within the meaning of the ordinance, and hence, as he is entitled to compensation only "on collections made by him," he is entitled to nothing for receiving it. The definition of the word "collect," as given by the lexicographers, is, to gather; to assemble. When used with reference to the collection of money, it often implies much more than the mere act of receiving the money. An attorney brings suit to enforce the payment of a demand, and the amount recovered is made by the sale of the defendant's property on judicial process. The term, as applied to such a proceeding, would describe, not only the act of receiving the money, but all the means by which the payment was enforced. The meaning of the word, as used in the ordinance, however, is to be determined from the context. The taxes for the general purposes of the city are collected by the county treasurer, and by him paid over to the city treasurer. The ordinance provides that for receiving the money so collected the treasurer shall receive no compensation. But the city may have other sources of revenue, such as license fees, or the like. Ordinarily, persons who desire to engage in business for which a license is required would apply to the proper officer for the license, and pay the fees exacted before engaging in the business. In such cases the only duty which would devolve upon the treasurer would be that of receiving and safely keeping the money. Cases might occur in which persons, through ignorance of the requirement, or from a desire to avoid it, would engage in the business without either procuring the license or paying the fees. In such cases it would probably be the duty of the treasurer to enforce payment by legal process. In either case, however, his act would amount to a collection of the money, and he would be entitled to compensation. This is made apparent, we think, by the proviso excluding from the operation of the provision for compensation all moneys received from the county treasurer. By excluding that particular item from the operation of the provision, the city, in effect, declared that moneys received by the treasurer from that source should

not be regarded as having been collected by him. The duty of the treasurer, however, to receive and safely keep it is in no respect different from that imposed upon him by the ordinances with reference to other moneys of the city. The reasonable and necessary inference from the fact that an exception was created as to the act of receiving that particular fund is that the act of receiving other funds was intended to be covered by the general provision. As we have said, the money received from the sale of the bonds belonged to the city, and it was plaintiff's duty to receive and keep it; and his act of receiving it was a collection made by him within the meaning of the ordinance. AFFIRMED.

MARSH & CO. v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Contract: WITH FIRM: CONDITIONS: EVIDENCE. The plaintiff firm had recently been organized, and it consisted of three persons, of whom M. and B. were two. These two had a conversation with defendant's agent to the effect that they were to have a certain rebate on every car of stock shipped by them over defendant's road, provided the "pool broke" or the rates were "cut." The agreement was with M. and B. personally, as defendant's agent knew nothing at that time of the plaintiff firm. The plaintiff firm now seeks to recover the rebate, but *held* that the evidence (see opinion) failed to show that the pool was broken or the rates cut, and that, therefore, the conditions of the agreement had never been fulfilled, conceding that plaintiffs were entitled to its benefits if they had been.

Appeal from Appanoose District Court.—HON. H. C. TRAVERSE, Judge.

FILED, OCTOBER 5, 1888.

THE plaintiff claims that in February, 1886, it made a verbal agreement with defendant to the effect that on all shipments of stock to be made by plaintiff from Seymour, Iowa, to Chicago, the defendant would pay to plaintiff a rebate of $19.50 from the regular schedule rate of fifty-two dollars on each car-load of stock so shipped; that

during the year 1886, and the month of January, 1887, plaintiff shipped from Seymour to Chicago, over defendant's railway, twenty-nine cars of live stock; that there was deducted from the selling price of the stock, and paid to defendant, fifty-two dollars for each car; that defendant has failed to pay the agreed rebate; and that there is due on account thereof the sum of $565.50. These claims are denied by defendant. The cause was tried to a jury, and a verdict returned and judgment rendered in favor of the plaintiff for the amount claimed. The defendant appeals.

Thos. S. Wright and *Tannehill, Vermilion & Haynes*, for appellant.

George D. Porter, for appellee.

ROBINSON, J.—I. The plaintiff is a co-partnership, of which Harlan Marsh, H. F. Babbitt and J. R. Babbitt are the members. Plaintiff claims that the contract in question was made with an agent of defendant named Conklin. The negotiations for the shipment of stock were carried on by H. F. Babbitt and Conklin, in the presence of Marsh. H. F. Babbitt testifies that in February, 1886, he and Marsh bought two car-loads of live stock, and went to Seymour to see about shipping them. That Conklin told them that the rates were uniform, and that he could not deviate from them, but that he said, "We'll take care of you, and protect you." That upon being told that they would not ship a car from there at fifty-two dollars, Conklin said, "We don't know how long this pool may last; we can't tell. It may pull out right away;" and, "We'll take care of you." That, upon being asked for something more definite, Conklin said: "If they go to make any rates on the other roads we don't want you to ship there. If they go to cut, you can have your rate." H. F. Babbitt also testified that the two loads, if not sold, were to run over until the other stock was shipped. That "our old rate on the Rock Island was $32.50 per car. The tariff rate was $52.50. After the first of January, 1886, they had taken

a half dollar off the schedule rate, and billed it at $52. The rebate was $19.50." Also: "I understood we were to get nineteen dollars and something less than the regular rate; that we were to have that much less than anybody else as soon as the pool broke. I don't think the dollars were mentioned as to anything we were to have off. The amount was not mentioned; merely our previous rate." Also: "He said whenever the pool was open, and they went to cutting rates, that we should have our rate from Seymour." Marsh testified that Babbitt made the contract with Conklin, and that "he told us they were pooled then, and were not giving any rates; but if the pool broke at any time we could have our old rate. That was the amount of the conversation, as near as I can give it." The terms of the so-called "pool" are not stated by any one, unless by Conklin. Marsh states that he does not know what the old rate was, excepting as Babbitt told him. It appears that the firm of Marsh & Co. had commenced business about two weeks before the conversation with Conklin was had; that it then had on hand seven car-loads of stock, and was intending to buy and ship stock. Prior to that time it had never shipped any stock over defendant's road, nor was any stock in fact shipped until the next month of June. The firm had never had a rate from defendant, and made no inquiries as to rates when the shipments were made. Of the twenty-nine cars of stock belonging to plaintiff, twenty-four were shipped in Marsh's name, four in the name of one Lewis, and one in the name of C. L. Cox. The shipments in the name of Lewis and Cox seem to have been so made for the purpose of obtaining passes. It is claimed by H. F. Babbitt, however, that Conklin said it made no difference in whose name the stock was shipped. We have set out the substance of the evidence given on behalf of plaintiff to sustain the alleged agreement. Nothing was said during the conversation with Conklin in regard to the firm of Marsh & Co., and Conklin testifies that he had never heard of it. He also denies having made the agreement alleged. If the evidence given on the part of

plaintiff be true, and the conflicting evidence given on the part of defendant be false, then an agreement is established by which defendant was required to give to Marsh and H. F. Babbitt a rebate on each car of stock they shipped, "if the pool broke," or "if they go to cut." But it is not shown that these two men ever shipped any stock after the agreement is said to have been made. It is true that Babbitt testifies that he made the arrangement for plaintiff, but it nowhere appears that defendant had notice of that fact. The arrangement was in terms made for the benefit of the two partners, who were present at the interview. By the terms of the agreement as claimed by plaintiff, it was not to go into effect until the "pool" should be broken, or until another railway company should give a cut rate. A mere offer to give such rates was not within the alleged terms. Neither of the stipulated conditions is proven. The only evidence relating to these conditions was to the effect that an agent of a rival company told plaintiff, about the time it made its first shipment, that he could do it some good in the way of rates. This agent testifies that he was authorized to make plaintiff a thirty-five dollar rate at the time in question, and a short time afterwards was authorized to make a thirty dollar rate, but he states that he made no offer to plaintiff, and does not show that a cut rate was actually made to any one. Conklin testifies that there was no pool, but an agreement to maintain schedule rates. Whatever the fact was, we are of the opinion that plaintiff has failed to show that any pool was broken, or cut rates given.

II. Other questions are discussed by counsel, but the views we have already expressed are sufficient as to all questions which are likely to arise on another trial For the reasons indicated the judgment of the district court is

REVERSED.

75	365
81	438
75	365
83	753

WALROD v. FLANIGAN *et al.*

1. **Boundaries**: ESTABLISHING LOST CORNER: EVIDENCE ON APPEAL. A proceeding under the statute to establish a lost corner is not triable *de novo* upon appeal; and where in such case the evidence was conflicting as to the actual original location of the corner, and the court below adjudged it to be at a point where it was not located by the field-notes of the original survey, but where some of the witnesses testified that they had often seen the mound and pit by which it was originally marked, *held* that this court could not interfere with such finding. The rule in such cases being that courses and distances must yield to fixed monuments, the trial court was not bound by the original field-notes.

2. **Appeal**: PRACTICE: STATEMENT OF ABSTRACT AS TO EVIDENCE. Setting out in the abstract a certificate of the trial judge to the effect that the bill of exceptions contains all the evidence, is not equivalent to saying that the abstract contains all the evidence, and is insufficient to justify this court in reviewing the evidence to see whether it sustains the judgment appealed from.

Appeal from Webster District Court.—HON. S. M. WEAVER, Judge.

FILED, OCTOBER 5, 1888.

THIS is a proceeding under the statute (Laws 1874, ch. 8) for the establishment of a lost corner. The corner in dispute is the quarter corner between sections 14 and 23, in township 89, range 30. The commissioners appointed by the court made a report in which they designate a point on a right line between the section corners east and west of the corner in dispute, and equidistant from them, as the true location of the corner. The district court set the report aside, and, on the evidence taken before the commissioners, and returned by them, entered judgment establishing the corner at a point one chain south and ten links west of the point designated in the report. Plaintiff appeals.

L. W. Names, for appellant.

No appearance for appellee.

REED, J.—The sole ground on which we are asked to reverse the judgment is that it is contrary to the evidence. No other question is raised by the assignment of errors, or argued by counsel. There are two sufficient reasons why we cannot disturb the judgment on that ground.

I. The cause is not triable *de novo* in this court, but is to be determined on the errors assigned. The judgment implies a finding by the court that the corner was established, in the original survey of the land, at the point designated by the judgment. That finding is in conflict with the field-notes of the original survey. But a number of witnesses, who were examined before the commissioners, testified that they had often seen the mound and pit by which the corner was marked, before they were obliterated, and that they were not at the point designated in the field-notes; and some of them testified that they were at the point designated in the judgment. The testimony of other witnesses as to that point, however, corresponded with the field-notes. The rule in such cases is well settled that courses and distances must yield to fixed monuments; and the question as to the point of location of the monuments was one of fact, and on that question there was a substantial conflict in the evidence. The rule that we will not in such case disturb the finding of the trial courts or jury has been so long adhered to that we ought not now to be asked to review it, and there can be no occasion for the citation of cases in support of it.

1. BOUNDARIES: establishing lost corner: evidence on appeal.

II. The other reason is that the abstract on which the case was submitted contains no statement that the evidence set out therein is all the evidence on which the case was heard below. In this respect the abstract is like that in *Love v. Donaldson*, 63 Iowa, 631, and the proceeding

2. APPEAL: practice: statement of abstract as to evidence.

of the same character. It is true, the abstract contains a certificate of the judge to the effect that the bill of exceptions contains all of the evidence in the case. But there is no allegation in the abstract that it contains all of the evidence set out in the bill of exceptions. We have uniformly held that this is not sufficient. *Porter v. Stone*, 62 Iowa, 442; *Wisconsin, I. & N. Ry. Co. v. Secor*, 70 Iowa, 647; *Fulliam v. Ctiy of Muscatine*, 70 Iowa, 436; *Woodrum v. Carraher*, 69 Iowa, 145.

AFFIRMED.

DIXON V. THE ROCKWELL, SAC & DACOTA RAILWAY COMPANY.

Railroads: RIGHT OF WAY: APPEAL: PARTIES: OWNER AND MORTGAGEES. Where damages for right of way are awarded jointly to the owner and the mortgagees of the land, upon notice to all of them, the mortgagor may maintain an appeal from the award without making the mortgagees parties thereto. (*Lance v. Chicago, M. & St. P. Ry. Co.*, 57 Iowa, 636, *followed*).

Appeal from Calhoun District Court.—HON. J. P. CONNER, Judge.

FILED, OCTOBER 5, 1888.

THE facts are stated in the opinion.

O. J. Jolley, for appellant.

J. C. Kerr, for appellee.

SEEVERS, C. J.—The defendant sought to condemn a right of way over certain real estate, and for this purpose caused a notice to be served on the plaintiff as owner, and Palmer & Searight and John T. Searight, trustees, for certain parties holding mortgages on the real estate, of its application to the sheriff to cause commissioners to be appointed to assess the damages. The commissioners made a joint assessment of damages to the parties above named. The plaintiff appealed from such assessment by serving notice of appeal on the sheriff and defendant. The latter filed a motion to

dismiss the appeal, because the trustees of the mortgagees did not join in the appeal; and thereupon the plaintiff asked leave to bring in and make said trustees parties to the appeal in case they refused to join therein. The motion of the defendant to dismiss the appeal was overruled, and the motion of the plaintiff sustained. Thereupon there was a trial and judgment rendered for the plaintiff. The only question we are required to determine is whether the court erred in refusing to dismiss the appeal. The case is in all respects like *Lance v. Chicago, M. & St. P. Ry. Co.*, 57 Iowa, 636; and counsel asks us to overrule that case. This we are not prepared to do, but, following it, the judgment of the district court must be

AFFIRMED.

75 368
84 284

PATTON V. VARGA.

Judicial Sales: UNDER JUNIOR AND SENIOR LIENS: RIGHT TO RENTS DURING YEAR FOR REDEMPTION. Plaintiff was the mortgagee of leased premises, and she had foreclosed her mortgage and bought the premises at foreclosure sale, but the year for redemption had not expired. She also had an assignment from the mortgagor of all rents due or to become due. Defendant had bought in the property at an earlier judicial sale upon a junior judgment, and had received a sheriff's deed. *Held* that defendant was entitled to the rents from the date of his deed up to the time when plaintiff should obtain a deed upon her foreclosure sale.

Appeal from Decatur District Court.—HON. R. C. HENRY, Judge.

FILED, OCTOBER 5, 1888.

THIS is an agreed case in which the parties seek a determination of their respective adverse claims to the rent of certain real property. The judgment in the court below was for defendant. Plaintiff appeals.

Chambers, McElroy & Roberts, for appellant.

Parish & Hoffman, for appellee.

BECK, J.—I. The facts involved in this case are set out in the agreed statement in full, and with particularity. A very brief statement here will prove sufficient for an understanding of the questions of law ruled in our opinion. Plaintiff is the mortgagee and the assignee of a mortgage, and as such claims a lien upon a house and lot. She is the purchaser of the property under a foreclosure of the mortgage, but the time for redemption has not expired. The defendant is the purchaser of the property under a judgment which is a lien inferior to the mortgage under which plaintiff claims, and has received a sheriff's deed for the property duly executed. The mortgagor executed to plaintiff before the foreclosure of the mortgage an assignment of the rents "due or to become due," or to arise afterwards, from the property. The rents so received by plaintiff it is stipulated shall be applied as payment upon the mortgage held by plaintiff. The plaintiff under this agreement claims all rents arising from the property. Defendant claims the rent from the time his sheriff's deed was executed until plaintiff shall obtain a sheriff's deed. The district court sustained the claim of defendant, and rendered a judgment accordingly.

II. We think the controlling questions in the case are not difficult of solution. The first one for determination is of fact, and involves an inquiry as to the precise effect of the assignment of the rents to plaintiff, which is in the following language:

"GRAND RIVER, IOWA, Jan. 31, 1885.

"For value received we hereby assign and set over to Mrs. Julia V. Patton, of Knoxville, Allegheny county, Pennsylvania, all rents now due or to become due from Bosworth, Jennings & Co., their successors and assigns, on the real estate occupied by said firm as a store building, etc., in Grand River, Iowa; also all rents hereafter to arise from the renting of said property,—all of said rents to be applied by said Julia V. Patton in liquidating a note and mortgage held by her on said property;

said property being now rented at three hundred and fifty dollars per year; the rent now due being at that rate from January 1, A. D. 1884."

The agreed statement of facts contains the following paragraph: "(5) That ever since January 31, 1885, said Julia V. Patton, at the request of L. D. Bosworth & Co., L. D. Bosworth and Harry Milligan (the mortgagors), has in her own name leased and controlled said property, and paid for all repairs and insurance on said property; and has made all contracts in regard to the leasing of said property, and collected and received all rents from said property that have been paid, and applied the same on her said mortgage; that since said January 31, 1885, said L. D. Bosworth & Co., L. D. Bosworth and Harry Milligan have had nothing whatever to do with said premises, but during said period said premises were rented, and rents collected by her in her own name." It will be observed that plaintiff does not become the lessor of the property for any time, nor was any interest transferred to her by the mortgagors in and to the property mortgaged, nor did they transfer to her their equity of redemption. All that was done was the assignment of the mortgagee's claim for rents; and authority conferred by the mortgagors upon her to collect the rents, and lease the property. She became an agent of the mortgagors, and nothing more. She surely had no right to rent the property, and collect the rent, as the owner, a tenant, or as one having any title in the property.

III. Now, it will not be disputed that the mortgagor of the property owns it, and his title is not divested until a deed is made upon foreclosure. He may rent the property, and collect the rent, in the absence of restrictions in the mortgage and decree. A tenant whose term does not expire until after the mortgagor has been divested of his title by judicial sale, may probably continue to hold the property under the lease. But the rent will go to the person who acquires the property by the judicial sale. The defendant in this case acquired the title to the property subject to the mortgages. With it he acquired the right to rents. The plaintiff,

as we have seen, acquired no other or different rights than those held by the mortgagors. Their rights were cut off by the sale and deed to defendant, and with them fall all the rights of plaintiff as an assignee and agent of the mortgagors. It seems to us that there can be no question or doubt as to the doctrines of the law we have just announced. And there is none as to the facts of the case. We therefore can see no possible escape from the conclusions we have announced. It is needless to cite cases in support of our conclusions, for we think the principles upon which they are based will not be questioned. The judgment of the district court is

AFFIRMED.

HAYWARD V. FULLERTON.

75 371
93 156

1. **Surety**: CONSENT TO EXTENSION OF TIME: LIABILITY. A surety on a note, who, after it is due, makes a payment thereon, and, acting at the instance of the principal, indorses thereon an extension of time at an increased rate of interest, does not thereby render himself liable as a principal debtor.

2. ——: NOTICE TO SUE: REMOVAL OF PRINCIPAL FROM STATE: DISCHARGE. Where the holder of a note neglects either to bring suit thereon, or to allow the surety so to do, when requested according to statute, the surety will be discharged, notwithstanding the principal has removed from the state. (Code, secs. 2108, 2109).

3. **Evidence**: SECONDARY: ON POINT ADMITTED. The admission of secondary evidence upon a point alleged in the answer, and admitted by plaintiff in answer to special interrogatories appended to the answer, is no ground for reversal.

Appeal from Blackhawk District Court. — HON. D. J. LENEHAN, Judge.

FILED, OCTOBER 5, 1888.

ACTION upon a promissory note. Trial by jury. Verdict and judgment for defendant. Plaintiff appeals.

Woodward & Cook, for appellant.

M. T. Owens and *Heber Hoff*, for appellee.

ROTHROCK, J.—I. The note in suit was executed on the first day of October, 1881, by one C. D. Calkins and the defendant. It was payable to the plaintiff or bearer in one year from its date, with eight per cent. interest. Calkins was the principal on the note, and the defendant was his surety. On the ninth day of October, 1882, the defendant paid $7.25 on the note, and wrote an indorsement thereon in these words: "Rec'd on the within seven and 25-100 dollars, and extend the within note one year from date, at ten per cent. interest." The suit was commenced more than one year after the indorsement was made. The defendant admitted that he was a surety, and denied that the agreement for an extension of time changed his liability from that of a surety. He further pleaded, and the evidence shows, that on the thirtieth day of September, 1885, he served upon the plaintiff a notice to the effect that he feared that Calkins was about to become insolvent, and requesting the plaintiff to bring suit upon the note, or send the note to defendant, that he might bring suit in plaintiff's name, and at his (defendant's) own expense. The plaintiff made no response to this notice. When the evidence in the case was all introduced, the court instructed the jury to return a verdict for the defendant, upon the ground that there was no evidence authorizing a verdict for the plaintiff.

1. SURETY: consent to extension of time: liability.

Counsel for the plaintiff contend that the extension of time indorsed on the note changed the obligation of the defendant from that of a surety to a principal. It appears from the evidence that the defendant acted in behalf of Calkins in procuring the extension of time. It is true, it does not appear that Calkins authorized the payment of ten per cent. interest in consideration of the extension. We do not think that by making the payment and securing the extension the defendant made the debt his own. In Brandt, Sur. sec. 26, it is said that "a surety may, by subsequent dealings between himself and the creditor, become a principal." This is no doubt correct, but it is apparent from the case cited

in support of the text (*Fluker v. Henry's Adm'r*, 27 Ala. 403) that the author has no reference to a mere contract for extension of time made at the instance of the principal debtor.

II. It appears from the evidence that Calkins, the principal, had permanently removed from this state at the time the notice to bring suit was served upon the plaintiff. It is contended by counsel for appellee that the statute does not require the holder of a note to pursue the principal to another state in order to avoid a release of the surety. But this is fairly answered by the statute authorizing the notice to be given. It provides that if a surety apprehends that his principal is about to become insolvent, or to permanently remove from the state, the surety may by writing require the creditor to sue upon the note, or permit the surety to commence suit in the creditor's name, and at the surety's cost. It is further provided that if the creditor refuse to bring suit, or neglect to do so for ten days after request, and does not permit the surety so to do, and furnish him with a true copy of the contract, and enable him to have the original when requisite in such suit, the surety shall be discharged. Code, secs. 2108, 2109. It is apparent that the creditor cannot, under these provisions of law, hold the surety without instituting suit against the principal in another state. The law imposes no hardship upon him. He has the option to commence an action himself, or permit the surety to do so. As sustaining the claim made by plaintiff's counsel, we are cited to *Phillips v. Riley*, 27 Mo. 386, and *Perry v. Barrel*, 18 Mo. 140. These cases have no application to the question. It does not appear therefrom what the provisions of the statute of that state are upon the subject. The case of *Conklin v. Conklin*, 54 Ind. 289, and other cases in that state, are also cited. It appears therefrom that the statute of Indiana does not provide for allowing the surety to commence suit in his own name. It merely provides for a notice to the holder to bring suit, and if he fails to do so in a reasonable time,

2. ——: notice to sue: removal of principal from state: discharge.

[redacted]

[redacted] ...sary is [redacted] ...ne. W[redacted] ...ne to the [redacted] ...obligation a[redacted]

The [redacted] ...evidence. I [redacted] ...incompetent [redacted] ...from the [redacted] ...sent to the [redacted] ...answer, and [redacted] ...swer to certain [redacted] ...me copy of the [redacted] ...here was no issue as [redacted] ...ged in the answer.

[redacted]

...E DWELLING-HOUSE INSURANCE COMPANY.

...AGAINST PRIOR INSURANCE : BREACH : ...policy in question was taken by the plaintiff H. alone, and in which they were ...mules which were sometimes kept in the barn. The policy had the usual ...and H. at the time held a policy on ...another company. *Held* that this was a ...prior insurance on the mules and

...EVIDENCE ON APPEAL. The ...waiver of such breach by the agent ...found in plaintiffs' favor by ...court cannot interfere with

...Clark.—HON. L. G.

THIS is an action upon a policy of insurance against loss or damage by fire. There was a trial by jury, and a verdict and judgment for plaintiffs. Defendant appeals.

J. C. Traer, for appellant.

Geo. M. Gilchrist, for appellees.

ROTHROCK, J.—I. The policy of insurance was issued on the twenty-fifth day of July, 1885, and by its terms it insured the plaintiffs' mules and horses, owned and kept upon certain premises, against loss by fire, lightning, tornadoes, etc., in the sum of five hundred dollars. On the twentieth day of August, 1886, and during the life of the policy, a barn was burned upon said premises, and two mules and four horses were destroyed by the fire. There is no dispute as to the loss of the property, nor the proofs of loss, or for failure to pay the insurance premiums. The answer, although containing formal denials, really interposes but one defense, which is that at the time the policy in suit was issued, and afterwards, there was a policy of insurance upon the barn which was burned, in the Eden Insurance Company, in the sum of one hundred dollars, and on the contents in the sum of five hundred dollars, and that said mules and horses were part of the contents of the barn at the time it was destroyed, and that the policy of the defendant was therefore void. The policy contained the usual provision that it should be void in case there was other insurance upon the property. The plaintiffs, by their reply, averred that the agent of the defendant, who wrote and issued the policy, knew at the time the insurance was effected that there was a policy in force issued by the Eden Insurance Company, and that by reason of such knowledge the defendant waived the provisions of the policy against prior insurance, and is estopped from claiming the same as a defense.

It appears that the farm upon which the mules and horses were kept, and the barn in which they were sometimes stabled, was owned by the plaintiff Horridge. He and his co-plaintiff Wright owned the horses and mules jointly. The prior insurance was in the name of Horridge alone. Some question appears to have been made upon the trial whether this was in fact and law prior insurance upon the property, within the meaning of the policy in suit. Indeed, the reply of appellant is somewhat equivocal upon that question. We think there can be no question that it was such prior insurance as would avoid the policy, unless there was a waiver. It is true, the prior policy was not in the name of both the plaintiffs as the persons assured; but it was evidently upon the same property, and, as the clause was intended as a protection against double insurance upon the same property, there can be no doubt that it was within the provision against prior insurance. See *Mussey v. Atlas Mut. Ins. Co.*, 14 N. Y. 79. The provision against prior insurance is violated if there was insurance upon the same risk, and it is immaterial whether the same be taken in the name of one or of both of the joint owners.

II. The material question of fact in the case was whether the defendant, by reason of the alleged knowledge of its agent, waived the provision against prior insurance. Upon this question the evidence is not very clear. There is a dispute in the abstracts of appellant and appellees as to what the evidence really was, and we have made a full and thorough examination of the transcript, and our conclusion is that we ought not to interfere with the verdict upon the ground that it is not supported by the evidence. We think the jury could fairly find that the agent knew of the prior policy, and that it covered the live stock. The apparent lack of evidence upon this question, as it appears to us, arises upon the construction put upon the prior policy by the agent. We do not have much doubt that he knew its contents, at least, in a general way.

III. It is claimed by counsel for appellant that the

court, in its instructions, erred in submitting to the jury the question as to the proper construction of the policy in suit. We do not think the jury could have so understood the instructions. As we have said, the issue tried to the jury was the effect of the prior insurance upon the rights of the parties. It is true, there were formal denials in the answer, which required proof upon the part of the plaintiffs. These were fully stated by the court in the instructions to the jury. But, after all, the pivotal and only material question in the case was whether the prior insurance was waived. This was apparent from the averments of the reply. The court plainly directed the jury that if there was prior insurance upon the property by the plaintiffs, or either of them, the policy in suit was void. There was no room for dispute as to whether mules and horses destroyed by fire in a barn should be considered as of the contents of the barn. That appears to have been conceded, so far as the record shows. If not conceded, it appears from the instructions to have been so considered by the court.

IV. Counsel for appellees claim the appeal should not be considered on the ground of defects in the record. We do not think these objections are well taken, and it is unnecessary to set them out or discuss them.

AFFIRMED.

In re ASSIGNMENT OF HOOKER & SON.

75	377
89	411
75	377
98	268
75	377
117	579
75	377
d124	407

1. **Reference**: REPORT: CONCLUSIONS OF LAW SET ASIDE: JURY TRIAL. Appellant agreed to submit her cause, on the facts and the law, to a referee, and she moved the court for the confirmation of the referee's report as a whole; but on appellees' motion the referee's conclusions of law were set aside, and the court rendered judgment on its own conclusions of law from the facts found by the referee. *Held* that appellant was not entitled, upon the setting aside of the conclusions of law, to have the cause submitted to a jury, as she would have been, under the doctrine of *Lyons v. Harris*, 73 Iowa, 292, had the findings of fact also been set aside.

2. **Partnership**: INSOLVENCY: PRIOR RIGHTS OF FIRM CREDITORS. Where a firm makes an assignment for the benefit of creditors, the creditors of the firm are entitled to be paid in full before a creditor of one member is entitled to anything, even though, as between the members themselves, that one member is the equitable owner of all the firm property.

3. **Assignment for Benefit of Creditors**: PRACTICE: ORDER FOR PAYMENT OF CLAIMS. When exceptions have been filed to a claim filed with an assignee, it is proper for the court, upon the hearing of the exceptions, and the determination of the order of the claim in question, to direct the assignee as to the payments he shall make though neither party requests such order. (Code, secs. 2122, 2123).

Appeal from Montgomery Circuit Court.

FILED, OCTOBER 6, 1888.

ON the sixteenth day of February, 1885, the copartnership of P. R. Hooker & Son, of which P. R. Hooker and his son W. F. Hooker were the only members, made a general assignment for the benefit of creditors. On the twenty-seventh day of the same month the appellant, who is the wife of P. R. Hooker, filed with the assignee her verified claim against "the firm of Hooker & Son for the sum of $1,019.01 of borrowed capital, invested February 21, 1881." Exceptions to this claim were filed by creditors of the firm, and by agreement the claim was submitted to Frank M. Davis, as referee. He heard the evidence and reported to the court the facts and his conclusions of law. Appellant filed a motion to confirm the report, and appellees filed exceptions and a motion to set it aside. The motion of appellant was overruled. The action on the motion of appellees was as follows: "The court, on the facts found, sustains the motion in so far as to be determined and adjudged by the court that the assets are partnership assets, and that contestants, as creditors of the copartnership of P. R. Hooker & Son, without any notice of plaintiff's claim against her husband, P. R. Hooker, or against the stock of goods, are entitled to be paid in full out of the assets in the hands of the assignee, before the claimant Susie A. Hooker,

who is at most only a creditor of P. R. Hooker individually, can be paid anything from said partnership assets. It is therefore ordered that the assignee pay to the said contesting creditors * * * the balance due on their claims, if enough assets remain in his hands for that purpose, and, if not, then to pay them *pro rata*. That from any assets remaining after paying said creditors in full, the claim of Susie A. Hooker be paid; to all of which said claimant excepts." The claimant, Mrs. Hooker, appeals.

S. McPherson and *James McCabe*, for appellant.

W. S. Strawn and *J. M. Junkin*, for appellees.

ROBINSON, J.—I. When the court below announced its intention not to confirm the report of the referee as a whole, appellant demanded another hearing and a trial by jury. This was refused. Appellant insists that the legal effect of the action of the court was to deprive her of her right to a trial by the referee, or by a jury, and to compel her to submit to a trial to the court against her will. Had the court set aside the report of the referee, not only as to conclusions of law, but as to the finding of facts, the claim of appellant would have been well founded, and the action of the court would have been erroneous. *Lyons v. Harris*, 73 Iowa, 292. But the court did not modify the report so far as it reported the facts. On the contrary, its action was based upon the facts as reported. The referee found as facts that the claim of appellant was just; that on the twenty-first day of February, 1881, a farm in which she had an interest was exchanged for a stock of goods; that Hooker paid to appellant a part of her interest, and agreed that the balance of her right in the land should remain in his hands for five years, and that he orally pledged the goods to her as security; that Hooker conducted the business in his own name until February, 1884, when his son was admitted into the store; that after that date business was carried on in the firm name; but the son put in no capital, and, so far as was shown, neither clerked

1. REFERENCE: report: conclusions of law set aside: jury trial.

nor rendered service of any kind in the store; that the debts owing to appellees were contracted after the son's name appeared in the business. The referee concluded, as a matter of law, that P. R. Hooker was owner of all the assets assigned, and of the interest therein to be distributed, and that the interest of the son was only nominal. The referee recommended that appellant's claim be allowed in full, and that she receive her distributive share with the other creditors. The action of the court was in conflict with the recommendation of the referee, and perhaps with the spirit of his conclusions of law; but he does not, in terms, say that the property conveyed by the assignment should not be treated as belonging to the firm so far as appellees are concerned. But even had he found that the law regarded this property as belonging to the father, and the facts reported showed that his conclusion was erroneous, the court might correct or disregard it. The report as to facts had the effect of a special verdict. Code, sec. 2822. If the conclusion of the referee is inconsistent with the facts which he reports, the latter must govern. *Sage v. Nichols*, 51 Iowa, 48. The facts as reported by the referee must be held to have been accepted by appellant. She not only did not except to them, but she asked that they be approved. The facts being correctly found, it would be useless to set aside the report because the referee had erred as to their effect in law. Therefore, the appellant was not denied a trial by the referee. Her objection that she was denied a trial by jury is not well founded. She waived her right to that by agreeing to a reference. *Hewitt v. Egbert*, 34 Iowa, 486. We think the facts reported by the referee show that, as to the creditors of the firm, the property in the hands of the assignee belonged to the firm. The right of firm creditors to have the property of the firm applied to the payment of their claims before the individual debts of the partners are paid is not questioned by the appellant.

2. PARTNERSHIP: insolvency: prior rights of firm creditors.

II. Appellant complains because the court rendered an alleged "judgment," on the ground that one was not

3. Assignment for benefit of creditors: practice: order for payment of claims.

asked by either party. The motions filed necessarily required the court to pass upon the claim of appellant, and the obligation of the assignee to pay it. The court, in effect, determined that the claim was valid as against P. R. Hooker, but that it could not be paid until firm creditors were satisfied, because the assignee had nothing with which to pay it but firm assets. The court, having proceeded thus far by request of the parties, was required to direct the assignee as to the payments he should make; and this it could do without a formal application. Code, secs. 2122, 2123. The order actually made did not exceed the authority given by statute.

III. It is further contended that the order of the court is without support in the evidence. We have not found it necessary to review the evidence, for the reason that there is no dispute as to the facts of the case. These are sufficient to justify the order made.

AFFIRMED.

TRULOCK V. THE FRIENDSHIP LODGE, K. OF P.

Appeal: PRACTICE: SECOND APPEAL AFTER AFFIRMANCE ON FIRST. Plaintiff appealed to this court from the judgment against him, and, upon failure to perfect the appeal, it was affirmed on motion. *Held* that, while such judgment of affirmance stood, even though it was erroneously entered, a second appeal could not be maintained.

Appeal from Des Moines District Court.—HON. CHARLES H. PHELPS, Judge.

FILED, OCTOBER 6, 1888.

ACTION by plaintiff, who was an officer of defendant, charged with the custody and disbursement of its money, to recover for payments made by him on a claim that he was in arrears in his accounts. The case was sent to a referee, and, on exceptions to his report, recommending judgment for plaintiff, it was set aside, and judgment was rendered for defendant on the ground that the action was barred by the statute of limitations. An

application for a new trial, on the ground of newly-discovered evidence, was overruled. Plaintiff appeals.

T. J. Trulock and *A. H. Stutsman*, for appellant.

P. Henry Smyth & Son, for appellee.

BECK, J.—A motion to dismiss the appeal was submitted with this case. It is based upon these facts: An appeal was taken in the case by plaintiff after the judgment, and upon failure to perfect the appeal it was affirmed, on motion, at the last December term, and a judgment to that effect was entered in this court, which stands in full force and effect. It is very plain that we must regard this judgment as a final adjudication in this case. But counsel claim that plaintiff withdrew the appeal taken by him, and no appeal was pending when the judgment was affirmed in this court. But, surely, the judgment of this court cannot be assailed in this collateral way. If the judgment was erroneously entered, the plaintiff must pursue another course to correct the error. The alleged withdrawal of the appeal, as we understand the facts, was made by service of a notice upon the defendant to that effect. There was no dismissal of the appeal in this court. As we now remember the case, this court, upon the motion to affirm the judgment, considered the claim of plaintiff that his appeal had been withdrawn, and upon the facts then before us affirmed the judgment.

In our opinion defendant's motion must be sustained, and the appeal of plaintiff must be

DISMISSED.

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GRETHER *et al.* v. CLARK *et al.*

1. **Adverse Possession:** BY MORTGAGOR PRIOR TO FORECLOSURE. The possession of land by the mortgagor and his grantees prior to a sale of the land upon foreclosure, is possession under an absolute right, and cannot be regarded as adverse to the mortgagee, unless accompanied with a denial of all right in the mortgagee; and the same is true of the possession of the grantee of the mortgagor after a foreclosure and sale to which such grantee has not been made a party, because as to him there has been no foreclosure and sale in law.
2. **Statute of Limitations:** MORTGAGE: MINORS. Where the statute of limitations begins to run against the ancestor in his lifetime, it will not, in favor of his minor heirs, cease to run upon his death; the exception in favor of minors (Code, sec. 2535) applying only to causes of action which originally accrue in their favor. (*Bishop v. Knowles*, 53 Iowa, 268). And so, where the ancestor foreclosed his mortgage against the mortgagors alone, and bought in the property, not making the grantee of the mortgagor, who was in possession, a party, and then died leaving minor heirs, his right of action for foreclosure as against the mortgagor's grantee accrued before his death, and was barred as against his minor heirs in ten years after it accrued, though the minor heirs had not then attained their majority. In such case the right of action was based on the mortgage, and not upon the judgment against the mortgagors.

Appeal from Boone District Court.—HON. JOHN L. STEVENS, Judge.

FILED, OCTOBER 6, 1888.

ACTION in equity. The petition contained a general prayer for relief upon the facts alleged, which are stated in the opinion. The judgment was for defendants and plaintiffs appeal.

Hull & Bicksler, for appellants.

Crooks & Jordan, for appellees.

REED, J.—Plaintiff Anna M. Grether is the widow, and the other plaintiffs are the children and heirs at law,

of John Grether, who died at Columbus, Ohio, in 1874. Prior to the eighteenth day of May, 1868, he was the owner of a tract of land in Boone county, and on that day he sold and conveyed the same to Margaret D. and O. J. Boyd, who gave him a mortgage on the property to secure a portion of the purchase money. They subsequently gave a second mortgage to John P. Manny & Co. On the twenty-fifth of March, 1870, they sold and conveyed the premises to Hortense E. Soward, who, on the fifteenth of February, 1873, sold and conveyed to defendant Clark. He afterwards conveyed to Beck, but there was a subsequent reconveyance to Clark, who held the title when this suit was instituted. After the conveyance to Soward, but before Clark purchased, Grether brought suit for the foreclosure of his mortgage, making the mortgagors only parties. He recovered judgment for the amount of the debt, and a decree of foreclosure, under which the land was sold, he being the purchaser, and a sheriff's deed was subsequently executed to him. Immediately after his purchase Clark took possession of the premises, and continued in possession until the sale to Beck, and Beck was in possession until the reconveyance to Clark, since which time the latter has been in possession. The mortgage to John P. Manny & Co. was foreclosed, and defendant Clark bought the premises at the sale, and obtained a sheriff's deed thereunder in 1875; but neither plaintiffs nor John Grether were made parties to the foreclosure proceeding. This suit was instituted in August, 1885. Soon after Grether's death an administrator of his estate was appointed by the probate court in Ohio, and it has been fully administered. At the time of his death his children were all minors, and two of them had not attained majority when the suit was instituted.

The defense relied upon is the statute of limitations. It will be observed that the grantees of the mortgagors had been in possession of the premises for more than ten years when the suit was instituted; and that possession was actual, exclusive and continuous; and that possession is relied

1. ADVERSE possession: by mortgagor prior to foreclosure.

upon as creating a bar to the action. But the occupancy was under an absolute right of possession. Under our statutes, the title and right of possession is in the mortgagor, and they continue until divested by a sale and deed under foreclosure proceedings. *Hodgdon v. Heidman*, 66 Iowa, 645; *Green v. Turner*, 38 Iowa, 112; *Gower v. Winchester*, 33 Iowa, 303. The grantee of the mortgagor before the foreclosure acquires the same rights. He has absolute right of possession, which before the conveyance was vested in the mortgagor. His possession, then, would no more be adverse, as against the mortgagee, than would that of the mortgagor if he had continued in possession. It may be that the rule would be otherwise if the possession were accompanied with a denial of all right in the mortgagee. But we have no occasion to go into that question; for the possession in this case was not accompanied with such denial, nor can it be inferred from anything that was done by defendants. Their conduct and acts in the premises are all consistent with their right of possession, and are referable simply to that right. The case turns, then, not upon the fact of possession, but upon whether any rights remain under the mortgage which may be enforced by plaintiffs. The right of action upon the note and mortgage accrued nearly sixteen years before this suit was instituted. As defendants were not made parties to the foreclosure suit, they were in no way affected by either the judgment rendered in that proceeding or the sale and deed thereunder. As against them, however, the lien of the mortgage continued, notwithstanding the foreclosure and sale, and Grether had a right of action against them for its enforcement. It is immaterial whether this right accrued at the maturity of the mortgage debt, or when the sheriff's deed was executed; for in either case it accrued to him in his lifetime, and the statute of limitations began to run at the instant it accrued. This right descended to plaintiffs upon his death, and it is the only right they ever acquired in the premises. It arose,

2. Statute of limitations: mortgage: minors.

not under the judgment of foreclosure, as was contended by counsel, but under the mortgage; and, if he had lived, would have been barred in ten years from the time it accrued. As the statute began to run during the life of the one in whose favor the right originally accrued, its operation was not suspended by his death; but, as against his representatives, to whom the right descended, it continued to run. The fact that some of them are minors does not affect the result. The estate descended to them charged with all the limitations which attached to it in the hands of their ancestors. The exception in favor of minors created by Code, section 2535, applies to such causes of action as accrued originally in their favor, and has no application to such as come to them by descent, and against which the statute had already begun to run. This is clearly the doctrine of *Bishop v. Knowles*, 53 Iowa, 268. Upon this ground, therefore, the judgment of the district court is right.

AFFIRMED.

Loomis & Son v. Stewart *et al.*

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1. **Assignment for Benefit of Creditors:** PART OF PROPERTY ONLY: VALIDITY. Section 2115 of the Code makes invalid a *general* assignment for the benefit of creditors which is not made for the benefit of all the creditors in proportion to the amount of their respective claims; but there is no statute depriving a debtor of the common-law right to make a partial assignment of his property for the benefit of his creditors. (Compare *Lampson v. Arnold*, 19 Iowa, 479).

2. ———: ———: DEED AS EVIDENCE. A deed of assignment for the benefit of creditors which purports to convey only a part of the assignor's property, is *prima facie* valid as a partial assignment, and is admissible in evidence as such.

3. ———: ———: VALIDITY: INSTRUCTION. The debtor executed a deed of assignment for the benefit of creditors, purporting to convey only his personal property. Shortly before its execution he conveyed his real estate to a creditor in satisfaction of a debt. The court directed the jury that if the deed for the real estate was executed in pursuance of a definite prior agreement between the debtor and the creditor, in such sense that its execution and that of the deed of assignment were not in reality parts of one and the same transaction, the assignment was not invalid. *Held* that the instruction was not objectionable on account of the failure to direct the jury as to what would be a valid agreement for the conveyance of the real estate; because, since the assignment purported to be partial only, the question of its validity depended only on whether it was in fact so; that is, whether the deed of the real estate and the assignment were not so connected in point of time and in intention as to form parts of the same transaction, and thus constitute a general assignment; which question was properly submitted. (*Burrows v. Lehndorff*, 8 Iowa, 96, and *Cole v. Dealham*, 18 Iowa, 551, *distinguished*).

4. ———: VALIDITY: EVIDENCE. The fact that an assignor has withheld a part of the assigned property and appropriated it to the payment of a particular creditor, will not invalidate the assignment, since the title to the property nevertheless passes to the assignee. And where the question before the court is the validity of the assignment, evidence of such facts is properly excluded as immaterial.

Appeal from Delaware District Court.—HON. JOHN J. NEY, Judge.

FILED, OCTOBER 6, 1888.

PLAINTIFF brought an action at law, on a money demand, against defendant Stewart, and sued out a writ of attachment, under which certain personal property was seized. Griffin intervened, claiming the property under a deed of assignment executed by Stewart before the attachment was levied. Plaintiff answered the intervenor's petition, alleging that the assignment was void for the reasons (1) that, at the time of its execution, and as part of the same transaction, Stewart executed a conveyance of certain real estate owned by him, and not exempt from execution, to the Delaware County Bank, a creditor, in payment of the debt he was owing it, thereby giving to it a preference over the other creditors; and (2) that it did not convey to the assignee all of the property then owned by the assignor, and not exempt from execution. The issue was tried to a jury, and there was a verdict and judgment for intervenor. Plaintiffs appeal.

Bronson, Carr & Leroy, W. H. Norris and *Blair & Dunham*, for appellants.

Yoran & Arnold, J. B. Satterlee and *E. P. Seeds*, for appellees.

REED, J.—There was no substantial conflict in the evidence. The deed of assignment under which the intervenor claims purports to convey to him all of the personal property, rights and credits belonging to the assignor, and not exempt from execution; and it empowers him to sell and convert the same into money, and pay the same to the creditors of the assignor in proportion to the amount of their several claims. The instrument was executed on the twelfth of October, 1887, and was delivered to the assignee on the same day, and he accepted the trust. About one hour before the instrument was executed, Stewart and his wife executed to the Delaware County Bank a conveyance of a forty-acre tract of land, it being the only real estate exempt

from execution which he then owned. He was indebted to the bank to the amount of six hundred dollars, for which it held his notes. Some time before the transaction in question, the cashier of the bank saw him, and urged him to pay the indebtedness, but he stated that he was not able to pay the amount at that time. During the conversation, however, he stated that he owned forty acres of land, which was incumbered by a mortgage for six hundred dollars, and he offered to convey the same to the bank, subject to the mortgage, in payment of the debt, and in answer to that offer the cashier stated that the bank would accept the conveyance. Stewart saw the cashier again on the eleventh of October, and inquired whether he should make the conveyance to the bank or to one of its officers, and was directed to make it to the bank. He was in failing circumstances at the time, and his creditors were pressing him for payment. When he executed the conveyance, he gave it to the attorney who prepared the deed of assignment, and requested him to deliver it to the bank, which he did about four hours after the delivery of the deed of assignment and the acceptance of the trust of the assignee. The attorney had no authority from the bank to receive or accept the deed for it, but in making the delivery he acted under the direction of Stewart. The assignee, however, was informed of the execution of the deed, and the object for which it was given, before he accepted the trust.

I. It was contended (1) that the naked promise of Stewart to convey the land to the bank, and the agreement of the cashier to accept it in satisfaction of the debt, did not create an enforceable equity in the property in favor of the bank; and (2) that the deed to the bank could not operate to divest Stewart of the property until its delivery, and delivery was not accomplished until the attorney surrendered it to the bank. And it was argued that, as Stewart continued to be the owner of the property when he executed the deed of assignment,

1. Assignment for benefit of creditors: part of property only: validity.

and did not include it in that conveyance, the assignment is void. For the purposes of the case it will be admitted that Stewart was the owner of the land when he executed the assignment; that the bank had no equity in it; and that the deed of assignment conveyed his personal property only to the assignee. It follows, then, that the assignment was of but a portion of his property. But the right of a debtor, in the absence of statutory restrictions, to make a partial assignment for the benefit of creditors has always been recognized. No right or interest in the property of the debtor accrues in favor of the creditors by virtue of the fact merely that they are creditors, but he may make any disposition of it he chooses, provided, only, that such disposition be made with an honest intent, and for a lawful purpose. He may lawfully pay or secure one or more of his creditors to the exclusion of others, and he may convert all or any portion of his property into money for that purpose. Now, our statutes have not undertaken to restrict the debtor as to the disposition of his property for the payment or security of his debts, except in the case of a general assignment, and the single limitation there prescribed is that such assignment can be made only for the benefit of all of the creditors in proportion to the amount of their respective claims. Code, sec. 2115. The whole subject was elaborately considered in *Lampson v. Arnold*, 19 Iowa, 479, and it is there distinctly announced that the common-law right of an insolvent to make a partial assignment for the benefit of creditors is in no manner affected by the statute. Under that holding the assignment in question would not be invalidated, even if the deed to the bank never became operative.

II. Plaintiffs objected to the admission of the deed of assignment in evidence, on the ground that it did not upon its face purport to be an assignment of all of the property of the assignor. Admitting the ground of the objection, still, as the instrument purports to convey the property in question, and *prima facie* is good as a partial assignment, it was admissible as evidence.

2. —: —: deed as evidence.

III. The court directed the jury, in effect, that if the execution of the assignment and the deed to the bank was in fact but a single transaction, and both instruments were executed by Stewart with the view of disposing of his property for the benefit of his creditors, then, as they covered all of his property, and gave a preference to the bank, the assignment was void. He also instructed that if there was a prior agreement between him and the bank, by which he had undertaken to convey the land to it, and such agreement was definite as to its terms and subject, and the deed was executed in pursuance of that agreement, in such sense as to be a distinct transaction from that of the execution of the assignment, and independent of it, the assignment was not invalid. One objection urged against this latter instruction is that it failed to direct the jury as to the essentials of a valid contract. The position of counsel is that the deed conferred no rights or interest on the bank before delivery, unless it was executed in pursuance of a valid and enforceable contract previously entered into between the parties, and as delivery was not accomplished until after the execution of the assignment, it was important for the jury to determine whether there was such prior agreement. If the assignment had been general,—that is, if it had purported to convey the real estate as well as the personal property,—this position would be applicable. But, as we have seen, it purported to convey but the latter, and the question as to its validity depended, not upon whether the deed was executed in pursuance of a prior valid agreement, but upon whether that act was so connected in point of time and intention with the execution of the other instrument as to form a part of that transaction, and with it constitute a general assignment. And that is the question which the instruction submitted to the jury. In view of the character of the assignment, it was not important to inquire whether the bank acquired any interest in the property before the delivery of the deed, or not. If the assignment had been general, it is probable that it

8. —: —: validity: instruction.

would not have acquired any. At least, so much is conceded. But the inquiry whether it did or not in no manner affects the question as to the real character of the assignment, which is the one upon which the case turns. That question was to be determined from the circumstances surrounding the execution of the instruments, and the motives and intentions of Stewart in executing them. These considerations dispose of the further objection urged by counsel that the evidence did not establish a valid and enforceable contract for the conveyance of the land between the bank and Stewart; also of the exception to the action of the court in refusing to give an instruction which defined, with more particularity than was done in those given, the essentials of a valid contract. The case, in its facts, is essentially different from *Cole v. Dealham*, 13 Iowa, 551, and *Burrows v. Lehndorff*, 8 Iowa, 96. The assignment in each of those cases was general, in that it purported to convey all of the assignor's property. Creditors of his sought to defeat it on the ground that by other conveyances, executed at the same time, and constituting part of the same transaction, he gave preferences to certain of his creditors. In those cases it was important to inquire whether the debtor was under any legal obligation to secure the preferred creditors. They did not involve the question here considered, whether the debtor intended to withhold a portion of his property from the assignment, and thus make it a partial assignment.

IV. The court excluded certain evidence offered to prove that the assignor had withheld certain of his personal property, and had appropriated it to payment of his debt to a particular creditor. If the facts are as claimed by plaintiff, the assignee can yet recover the property, and could be compelled to pursue it by proper proceedings in the hands of the purchaser. But they do not invalidate the assignment. Under it the title to all of the personal property of the assignor passed to the assignee, regardless of any secret intentions on the part of the former.

4. ——: validity: evidence.

AFFIRMED.

BUCHANAN v. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

1. **Evidence**: OPINION: COMPETENCY. A woman who was accustomed to drive over a railway track where a flagman was stationed, every day, and sometimes five or six times a day, was competent to testify that she knew the flagman's signal to stop and to go on, and that he gave the signal to go on at the time in question.

2. **Railroads**: INJURY TO TRAVELER AT CROSSING: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. A woman driving a horse to a buggy was approaching the crossing of several railroad tracks where a flagman employed by the defendant was habitually stationed. She stopped within half a block of the crossing to await an opportunity to cross. The flagman signaled for her to come on, which she did, though she knew a train was approaching on one of the tracks. When her horse had reached the first track the flagman stopped her, and the horse became frightened, turned, upset the buggy and ran away. There was evidence tending to show that, had the flagman not interfered, she would have effected the crossing in safety. These being the facts, *held*, in an action to recover for resulting injuries, that it was error to direct a verdict for the defendant on the ground that she was guilty, as matter of law, of contributory negligence, but that that question should have been submitted to the jury.

3. ——— : ——— : NEGLIGENCE OF FLAGMAN FOR THREE COMPANIES: WHICH LIABLE. Three railroad companies had their tracks on the same city street, and, by agreement among them, one company employed and paid a flagman at one street crossing, another at a second, and the other (the defendant) at a third crossing. By the negligence of the flagman at the third crossing in signaling the approach of a train belonging to one of the companies which did not employ him, plaintiff's assignor was injured. *Held* that the flagman was defendant's servant, even when flagging a train for one of the other companies, and that defendant was liable for his negligence.

Appeal from Linn District Court.—HON. J. H. PRESTON, Judge.

FILED, OCTOBER 8, 1888.

THIS is an action to recover for a personal injury, and for damages to a horse and buggy, occasioned, as is alleged, by the negligence of a flagman at a street crossing of the track of the defendant's railroad, and

the tracks of the Chicago & Northwestern Railway Company, and the Burlington, Cedar Rapids & Northern Railway Company. There was a trial by jury. At the close of the introduction of the plaintiff's evidence a motion was made by defendant's counsel to direct the jury to return a verdict for the defendant. The motion was sustained. The plaintiff appeals.

Henry Rickle, for appellant.

Mills & Keeler, for appellee.

ROTHROCK, J.—I. The material facts in the case are in substance as follows: The defendant, and the Chicago & Northwestern Railway Company, and the Burlington, Cedar Rapids & Northern Railway Company, all have railroad tracks on Fourth street, in the city of Cedar Rapids. The street, while not laid out with the cardinal points of the compass, may, for the purposes of this opinion, be said to run east and west. On the west side of the street are two tracks belonging to the Northwestern road; next is the track of the Burlington, Cedar Rapids & Northern road; and on the east side of the street is the track of the road of the defendant, the Chicago, Milwaukee & St. Paul Railroad Company. The four tracks practically occupy all of that part of the street which is between the sidewalks; that is, the street is not used to any extent for travel and traffic. These railroad tracks are used by all the trains of these roads. There are no other tracks upon which said companies run trains through the city. Fourth street is crossed at right angles by First, Second, Third and other avenues. Owing to the great number of trains passing over these tracks, it became necessary some years ago to place flagmen at the crossings of First, Second and Third avenues, in order to protect travelers upon those avenues from collisions with trains. The Burlington, Cedar Rapids & Northern Company employed a flagman at the First avenue crossing. The Chicago & Northwestern Company employed one at the Second avenue crossing, and the defendant employed one

at Third avenue. The evidence shows that the flagman at Third avenue was hired by the defendant, his name carried on its pay-roll, that he was paid by it, and that he was placed there for the purpose of attending to the duty of flagman at that crossing for all the trains of said companies. In May, 1886, the plaintiff's wife and her mother were driving a single horse to a buggy along Third avenue, and approaching Fourth street from the west. The plaintiff's wife was holding the reins and driving the horse. Before reaching Fourth street, the plaintiff's wife observed that a freight train was standing on one of the railroad tracks. The train had been opened or parted to allow vehicles to cross, and it closed up and was coupled together and moved off. The horse was stopped about half a block away from Fourth street, to await an opportunity to pass over. Before the caboose at the end of the train entirely cleared the crossing, the flagman came round the end of the caboose, and signaled to the plaintiff's wife to drive over. The signal was made with a flag. The horse was driven up to the crossing, and, when he was about to the first track, the flagman called to the driver to stop, and moved his flag close up in front of the horse. The horse became very much frightened, and one witness testifies that the flagman seized hold of the bridle. A freight train was approaching from the east on the west track. The horse backed and turned, and upset the buggy and ran away, injuring the driver and her mother, and the horse and buggy. The plaintiff's wife assigned to him her claim for the personal injury to her, and he seeks to recover damages for that, and for the injuries to the horse and buggy.

Several objections are made to the rulings of the court in excluding certain evidence offered by plaintiff.

1. Evidence: opinion: competency.

These questions do not appear to us to demand extended consideration. The plaintiff's wife stated as a witness that the flagman moved his flag for her to come on. This statement was stricken out on motion of defendant. The objection to it was that it was incompetent, immaterial and

matter of opinion. But the witness was immediately allowed to state that she knew the signal to stop or to go on, and that the flagman gave the signal to go on. That she was competent to give this evidence was apparent from the fact that she testified that she had been in the habit of crossing at this place every day, and sometimes five or six times a day. She also testified that the horse was "very much afraid of the cars ever since, and runs every time he sees one," and that she cannot drive the horse any more, and that she never had difficulty in driving him before. Counsel then asked her whether the horse had a disposition to frighten at trains before. An objection to this question was sustained. We think the question was proper, but the court may have been of opinion that the witness had already answered the question in substance. The same may be said of objections which were sustained to questions by which it was sought to show that, if the flagman had not stopped the horse and frightened him, there would have been ample time to have passed over the crossing without injury from the approaching train.

II. It is claimed by counsel for appellee that the court was justified in instructing the jury to find for the defendant upon the ground that the plaintiff's wife was guilty of contributory negligence. We do not think this position can be sustained. The ground upon which the claim is based is that she should have seen the approaching train, and stopped the horse before driving him upon the track. The evidence shows that she and her mother heard the ringing of the bell upon the approaching engine, and that her mother saw the train. There are two sufficient answers to this position of counsel: (1) There was evidence which should have been submitted to the jury, to the effect that, if the flagman had abided by his first signals to cross over, there would have been no injury. Indeed, the jury could not fairly have found that there was not ample time to make the crossing in safety if the flagman had not interfered, and frightened the horse. (2) No

8. RAILROADS: injury to traveler at crossing: contributory negligence: question for jury.

court would be justified in holding as matter of law that there could be no recovery because the driver did not stop before reaching the track. She did stop, and was bidden to go on; and, while she would not have been justified in rushing into a place of obvious danger, yet it was for the jury to determine whether she was justifiable in relying on the signal to cross over.

III. Counsel for appellant contends that the flagman was acting in the line of his duty in giving the signal to cross over, and in his efforts to stop the horse when he came up to the crossing. We think he is correct in this claim, and we do not understand that defendant's counsel dispute the general proposition that, if the flagman was guilty of negligence by reason of which the injury occurred, there can be a recovery as against some one. But it is insisted that, as the approaching train was a Northwestern train on one of the Northwestern tracks, the flagman was not performing any service for the defendant, but for the Northwestern company. In other words, it is claimed that, if there was actionable negligence of the flagman in attending to his duty upon the approach of a train upon any of the tracks, the right of action is maintainable against the company owning the track and operating the train thereon. Counsel for appellee base their argument on this point upon the following propositions, which we will state in their own language: "(1) That at the time and place of the accident the flagman was engaged in performing services and duties for the Chicago & Northwestern Railway Company alone, in which this defendant had no interest, and over which it had no control. (2) That in performing such duties and services, the flagman was then acting under the immediate and exclusive direction and control of the Chicago & Northwestern Company, who alone were responsible for his acts. He was their servant *ad hoc*. (3) That the service and duty to be performed by the flagman for the several railway companies was not one in which they were jointly interested, but was separate and

s. —: —: negligence of flagman for three companies: which liable.

distinct for each company. Defendant had no interest in, or control over, the tracks or trains of the Chicago & Northwestern Railway Company, or the flagging for that road." We do not understand counsel for appellant to combat these general propositions, but he claims that the evidence does not sustain them. As we have said, each of the three railroad companies employed a flagman,—one at First, one at Second, and one at Third avenue,—and each flagman performed the duty pertaining to his employment for all the trains on all the roads. The only witness who testified upon this question was the flagman by whose alleged negligence the accident occurred. He was paid in full by the defendant company, and there is no evidence that any part of his wages was paid by either of the other companies. Upon the face of the record, as presented in the pleadings and evidence, the fair presumption would be that each of the companies paid the flagman whom it employed. The service does not appear to have been greater, nor more difficult, nor to have required a man commanding higher wages, at one crossing than another. The flagman did not claim that he had any separate contract with each company. It is true, he persisted in stating as a witness that at the time of the accident he was in the service of the Northwestern Company, and that, when a train approached upon the track of any of the roads, he flagged that train for that company; and that "lots of times" he talked with the agents of the Northwestern and Burlington, Cedar Rapids & Northern Companies about flagging their trains. All the testimony he gave upon this point was in the nature of an argument. He gave no facts tending to show any employment by any one, except that he was sent there by the defendant to do his work at that crossing, for which the defendant paid him; and his employment was to flag the crossing, no matter whose trains, nor upon what roads they were run. The idea that he was under the employment of one company for five minutes, and then another for a few minutes, and another for a short time, and that he changed his employers with the

facility with which the kaleidoscope exhibits an array of colors, involves an absurdity. It can only be accepted upon the theory that one of these companies had one set of signals for flagmen, and the other a different kind, and that one required the signal to be given when another did not, and thus make their flag service, not only the ridicule of the public, but a system of deception, to the great peril of the most prudent and careful drivers. As far as this record shows, the defendant was the proper party. The property in the different tracks and the owners of the trains do not enter into the question, so far as it appears in the evidence. There was evidence proper to be submitted to the jury that each of these companies was responsible for the flag service at the crossing where it employed, placed and paid a flagman; and that they could each contract with the other in that manner cannot be questioned. And when the defendant thus undertook to guard and flag the crossing at Third avenue, it is, to say the least, primarily liable to the traveling public for the proper performance of that duty. We do not deem it necessary to cite authority in support of this proposition. As supporting it, however, see *Kellogg v. Payne*, 21 Iowa, 575. It will be understood that we are determining the question of the alleged negligence of a flagman, and not the negligence of employes operating a train on one of the tracks in said street. REVERSED.

LAMB v. WEST *et al.*

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Redemption: FROM JUNIOR MORTGAGEE WHO HAS REDEEMED FROM SENIOR FORECLOSURE: AMOUNT TO BE PAID. Where the holder of a junior mortgage, more than six and less than nine months from the date of sale under the senior mortgage, buys in the certificate of sale, and files an affidavit with the clerk, stating the amount of his lien, and that he has redeemed as a junior lien-holder, he is a redemptioner within the meaning of the statute (see *Lamb v. Feeley*, 71 Iowa, 742), and the owner of the land, with knowledge of all the facts, cannot redeem from him without paying the amount of both liens. The fact that an action is pending for the foreclosure of the junior mortgage, and that a valid defense has been pleaded thereto, makes no difference.

Appeal from Tama District Court. — HON. J. D. GIFFEN, Judge.

FILED, OCTOBER 8, 1888.

ACTION in equity. Judgment for plaintiff and defendants appeal.

Stivers & Strong and *J. W. Willett*, for appellants.

Struble & Stiger, for appellee.

SEEVERS, C. J.—The facts are that in 1876 Michael Feeley owned the land in controversy, and executed a mortgage thereon to Jane Montgomery. In 1884, the mortgage was foreclosed in Scott county, a special execution issued thereon, and the land, which is situated in Tama county, sold thereunder to Jane Montgomery, and a certificate of purchase executed to her by the sheriff. In 1882, Michael and Bridget Feeley executed a mortgage on said premises to Bracken & Goodell to secure a promissory note of nearly six hundred dollars. In 1883, the plaintiff, became the owner of this mortgage. On July 30, 1885, the plaintiff became the owner by assignment of the Montgomery certificate of purchase, and at the same time was the owner of the junior Bracken & Goodell mortgage. On October, 1885, the defendant West, for the purpose of redeeming from the sale to Montgomery, paid to the clerk of the district court of Tama county the amount of money required to redeem from such sale,—he at that time being the owner of the real estate subject to the mortgage aforesaid,—and he knew the certificate of sale had been assigned to and was owned by the plaintiff. Because of the effort made by West to redeem, the sheriff declined to execute a deed in pursuance of the sale to Montgomery until more than twenty days after one year from the sale had expired. Afterwards the defendant West executed a warranty deed, conveying the land to his co-defendant Haylor. Afterwards West obtained the money paid by him to the clerk, and thereafter the

sheriff conveyed the premises in controversy to the plaintiff. The foregoing facts are conceded, and are in no respect controverted. The plaintiff alleges in his petition that West made the redemption and procured the sheriff to refuse to execute the deed in fraud of the rights of the plaintiff, and the transaction between him and Haylor was fraudulent as to the plaintiff, and that Haylor had full knowledge of the rights of the parties. The last and all allegations of fraud are denied. The defendants also pleaded that an action was pending, brought by the plaintiff for the foreclosure of the Bracken & Goodell mortgage, and that a full and complete defense had been pleaded thereto, and that such action was pending and undetermined. The relief asked by plaintiff was that the title to the land be confirmed, and the deed from West to Haylor be set aside, and his title quieted. The relief asked in substance was granted by the judgment of the court, and the defendants appeal.

The plaintiff's title under the Montgomery foreclosure and sheriff's deed must be regarded as vesting in the plaintiff the absolute title, unless the effort made by the defendant West to redeem, and his subsequent conveyance to Haylor, are sufficient to vest in the latter a title superior to that of the plaintiff. In determining who has the better title, we are required to determine whether West made a legal redemption from the sheriff's sale to Montgomery. The defendants maintain the affirmative of this proposition, but their claim cannot be sustained, for the reason that it has been held by this court that the assignment of the Montgomery certificate of the sale to the plaintiff at the time and under the circumstances it was made amounted to and was a redemption from such sale by him as holder of the Bracken & Goodell mortgage. *Lamb v. Feeley*, 71 Iowa, 742. Such being true, West, being the owner of the premises, could not effect redemption without paying to the clerk the amount due on the Bracken & Goodell mortgage held by the plaintiff, in addition to the

amount due under the sale to Montgomery; and this West did not do. West had knowledge of all the facts, and the fact that an action was pending to which a valid defense was pleaded is immaterial, for the reason that such defense had not been established. Besides this, the defense, we have reason to assume, simply went to the question that plaintiff was not entitled to foreclose the mortgage because he was a redemptioner. See the case of *Lamb v. Feeley*, above cited. This in no manner affected plaintiff's right to a sheriff's deed under the sale to Montgomery, nor did it have any effect on the right of West to redeem, or the amount of money he should pay in order to effectuate it.

As West failed to redeem, the next question is whether Haylor is an innocent purchaser without knowledge of the plaintiff's rights; and without doubt or hesitation we find he was not such a purchaser. On the contrary, we find he had at least sufficient knowledge of the plaintiff's rights to put him on inquiry. There cannot be any doubt as to this. We do not deem it necessary to set out the evidence, and such is not our practice. The judgment of the district court is

AFFIRMED.

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PALMER & SEAWRIGHT v. WOODS *et al.*

Sureties: ON COUNTY CLERK'S BOND FOR SECOND TERM: DISCHARGE: MISREPRESENTATION OF SUPERVISORS. While it is the duty of the board of supervisors, under section 690 of the Code, to require an officer who has been re-elected to produce and account for all public funds which have come into his hands under color of his office, before approving his bond for a second term, yet a failure to perform such duty, and a false pretense by the board that it has been performed, will not discharge the sureties on the bond for the second term, after it has been accepted and approved, from liability for a defalcation occurring during that term.

Appeal from Ida District Court.—HON. J. H. MACOMBER, Judge.

FILED, OCTOBER 8, 1888.

ACTION on an official bond. Defendant Woods was elected clerk of the district court for the term commencing the first Monday of January, 1887. The other defendants are the sureties on the bond, and they alone defend in the action. One of the conditions of the bond is that the principal would pay over to the officer or person entitled to receive the same all moneys which should come into his hands by virtue of his office. The breach alleged is the failure to pay over certain money which was paid to him in redemption of real estate, which had been sold on execution issued from his office. The case was decided on demurrer to the answer. It is alleged in the answer that Woods held the office for the term preceding that for which the bond was given; that during such preceding term, and at the end thereof, he was a defaulter; that large amounts of money, including certain public funds, had come into his hands by virtue of his office, for which he did not account; that he gave a bond for the preceding term on which two members of the board of supervisors were surety; that the board did not require him to account for the public moneys he had received during the term, but with knowledge that he was a defaulter, they accepted and approved the bond in suit, and permitted him to enter upon another term of office; that, while pretending to have made a settlement with him, and that he had accounted for the public moneys received by him, they did not in fact make such settlement, nor was there any accounting; that such pretense was false, and a fraud upon the sureties, who relied thereon when they signed the bond and had no knowledge of the falsity of said representations. When the district court sustained the demurrer to the answer, defendants refused to plead further, and judgment was entered against them for the amount claimed, and they appeal.

C. W. Rollins and *Jay D. Miller*, for appellants.

Elwood & Zane, for appellee.

REED, J.—It was the duty of the board of supervisors to require Woods to produce and account for all public funds which had come into his hands under color of his office before approving his bond for the second term. Code, sec. 690. But neither the failure to perform that duty, nor the false representation that it had been performed, will release the sureties from liability for a defalcation occurring subsequent to the approval of the bond. Their undertaking was for the faithful performance by the clerk of the duties of the office during the term upon which he was about to enter. They assumed no liability as to his previous acts, nor are they sought to be charged with any such liability. The money for which a recovery was sought came into his hands after their undertaking had been accepted. It has not been claimed that the failure of the board of supervisors to perform the duty required by the statute before approving the bond invalidated the undertaking of the sureties, and it is manifest that such failure could not have that effect. The object of the statute in requiring the accounting by the officer before the approval of his bond for the second term is to prevent the continuance in office of dishonest or incompetent officers. The validity of the undertaking of the bond does not depend upon the performance of that duty. For the bond takes effect from the time of its delivery and approval, and from that time the person is an officer, in fact and in law, whether the duty has been performed or not. But the substance of defendants' complaint is that they were induced to enter into the undertaking and incur the liability by the false representation that the duty had been performed and the accounting had. This, however, amounts to no more than an allegation that they were misled by the representations as to the competency and honesty of the man for whose official conduct they were about to become answerable; but those were matters as to which the board of supervisors were not bound to give them advice or information. Their duty was to make the settlement, and approve the

bond if they found the sureties sufficient, and that the public funds had been accounted for, and if not, to reject it; and that duty they owed to the county and the public, and not to the individuals who were proposed as sureties. As they owed them no duty in the premises, this understanding could not be affected by any representation, however false or fraudulent it may have been.

AFFIRMED.

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131 490

THE CITY OF OTTUMWA v. CHINN *et al.*

Cities and Towns: NUISANCES: ABATEMENT BY CITY: REMEDY: ACTION IN EQUITY. A city cannot maintain an action in equity to enjoin and abate a nuisance on the ground of injury to its citizens, since that remedy is given only to "any person injured thereby." (Code, sec. 3331). But the authority of the corporation to abate a nuisance, given by section 456 of the Code, is to be exercised in the enforcement of an ordinance enacted under section 482 of the Code. Whether if the corporation as such were specially injured by the nuisance, it might not then maintain an action in equity, under section 3331 of the Code, is not decided. (See opinion for citations).

Appeal from Wapello District Court.—HON. DELL STUART, Judge.

FILED, OCTOBER 8, 1888.

ACTION in equity to restrain the maintenance and for the abatement of an alleged nuisance. A demurrer to the petition of plaintiff was sustained. Plaintiff electing to stand upon its petition, judgment was entered in favor of defendants. The plaintiff appeals.

W. W. Epps, for appellant.

E. L. Burton, for appellees.

ROBINSON, J.—The petition alleges that plaintiff is a city of the second class, duly organized under the laws of Iowa; that Fred Chinn is the owner of a certain tract of land situated within the limits of plaintiff, and of a

slaughter-house thereon; that George Hammer and others are the lessees of said premises; that cattle, sheep and hogs are kept on said premises, and slaughtered there; that excrement, offal and filth are retained and allowed to decay in and around said slaughter-house, and the fat of slaughtered animals is rendered, and work usually done at such places is carried on, in said house; that by reason of the facts aforesaid the said premises occasion and give rise to noxious exhalations and offensive odors, greatly corrupting the air in the vicinity, and cause annoyances dangerous and injurious to the health, comfort and property of the citizens residing in the vicinity; that said excrement, offal and filth are washed, by the natural flow of a stream of water upon which the slaughter-house is situated, into the Des Moines river, immediately above the head-race and source of the water supply of the Iowa water-works, which furnish the general water supply to the city of Ottumwa and its citizens; that in consequence the water is "contaminated with animal matter and poisonous refuse, which endanger the health and lives of the citizens who are compelled to use the water from said water-works,—said poison producing fever and other diseases, whereby said premises are a nuisance." The plaintiff asks that the premises, and the business of slaughtering thereon, be declared a nuisance; that defendants be enjoined from using the premises for the business of slaughtering, and the accumulation of filth; and that the nuisance be abated. The demurrer was upon the following grounds: "(1) Plaintiff does not aver any injury, special to itself, which would justify a court of equity in granting the relief prayed for. (2) There is no special injury or damage averred, and no damage except that which is common to the public. (3) Damage or injury to the public cannot be prosecuted in a civil action in the name of the city."

It may be conceded, as claimed by appellant, that the petition shows the maintenance of a nuisance within the definition given by section 3331 of the Code. But that section only authorizes an action

to restrain and abate such nuisance to be brought "by any person injured thereby." As a general rule, a public nuisance gives no right of action to a private person, unless he suffer a special injury, distinct from that of the general public. *Ingram v. Chicago, D. & M. Ry. Co.*, 38 Iowa, 675, and cases therein cited; *Park v. C. & S. W. Ry. Co.*, 43 Iowa, 636; *Mayor v. Canal Co.*, 12 Pet. 99. It is insisted by appellant that section 456 of the Code confers the right to maintain this action. That section gives to cities and towns, organized under the general law of the state, "power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated." It is claimed by appellant that this power may be exercised in any manner which the corporation may think best, and that, since it may sue and be sued, it can accomplish the purpose of the statute by means of an action in court. Under the statutes of Massachusetts an action of this kind may be maintained. *Taunton v. Taylor*, 116 Mass. 254. But the right of appellant to maintain this action is governed by the statutes of Iowa. It is a general proposition of law that municipal corporations have and can exercise only those powers granted in express words; those necessarily implied or incident to the powers expressly granted; and those essential to the purposes of the corporation. *Clark v. City of Davenport*, 14 Iowa, 500; 1 Dill. Mun. Corp. sec. 55; *Hanger v. City of Des Moines*, 52 Iowa, 194. Section 482 of the Code authorizes cities and towns to make and publish ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers conferred by section 456, and other sections of the same chapter. The ordinary method of abating a public nuisance, and punishing its author, is by criminal proceedings. *Mayor v. Canal Co., supra.* "Though the jurisdiction of equity in restraint of public nuisances is well established, it will not be exercised where the object sought can be as well attained in the ordinary tribunals, unless upon the application of one who suffers a personal injury aside from the injury to

the public." 1 High, Inj., sec. 761. The petition in this case charges a nuisance within the meaning of section 4089 of the Code. The remainder of the chapter in which that section appears provides for the abatement of the nuisance, and the punishment of the one who caused it. So far as the petition shows, the rights of the general public may be fully protected by ordinary criminal proceedings. The plaintiff does not appear to be specially affected by the nuisance, but bases its demand for relief upon the alleged fact that it is injurious to its citizens. These, however, constitute a part of the general public. Plaintiff is not authorized to bring an action for the benefit of the public, and has failed to bring itself within the provision of section 3331 of the Code. In view of the general provisions of the statute relating to public nuisances, we conclude that the abatement contemplated by section 456 of the Code was to be effected by the direct action of the corporation itself, as through the medium of an ordinance, rather than by equitable proceedings in court. The judgment of the district court is therefore

AFFIRMED.

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PUMPHREY V. WALKER.

Instructions: CONFLICT: VERDICT: JUDGMENT NOT WARRANTED. In an action on a note given for borrowed money to plaintiff's husband, plaintiff alleged that she was the owner of the note. One of the defenses was that the note was executed on an usurious contract, and that plaintiff was neither the assignee nor owner of it. The eleventh instruction was to the effect that plaintiff had the burden to show her ownership of the note. One paragraph of the fourteenth instruction was as follows: "If you find from the evidence that the note has not been paid, or settled and adjudicated, but that at the time of making said note, as a part of the contract thereof, usurious interest was agreed upon, then, after filling in the sum loaned, and date of said loan, your foreman should sign verdict number 2." In accordance with this instruction the jury returned the following verdict: "We, the jury, find that the amount loaned * * * was $70, and that said loan was made on the 7th day of June, 1877." *Held*—

(1) That the fourteenth instruction was repugnant to the eleventh, in that the jury would understand therefrom, and did understand, that in case they found the facts as stated in the fourteenth instruction, they should find verdict number 2 for plaintiff, without finding that she was the owner of the note.

(2) That because said verdict did not show a finding upon the issue as to the ownership of the note, nor a general or special finding for the plaintiff, it did not authorize a judgment for plaintiff for the amount loaned, and for the school fund for usury found by the court.

Appeal from O'Brien District Court.—HON. SCOTT M. LADD, Judge.

FILED, OCTOBER 8, 1888.

ACTION upon a promissory note. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Alfred Morton and *Warren Walker*, for appellant.

No appearance for appellee.

BECK, J.—I. The note in suit is payable to J. R. Pumphrey. The petition alleges that it is now the property of plaintiff. Among other defenses, the defendant pleads that the note was executed upon an usurious contract, and that plaintiff is neither the assignee nor owner of the note. The cause was tried upon the issues raised by these defenses and other issues in the case. The district court, in the last instruction, directed the jury in the following language: "14. If you find from the evidence under the instructions of the court that defendant has paid the note in suit, or that the same has been settled and adjudicated, then one of your number, to be selected as your foreman, should sign verdict number 1. If you find from the evidence that the note has not been paid, or settled and adjudicated, but that at the time of making said note, as a part of the contract thereof, usurious interest was agreed upon, then, after filling in the sum loaned, and the date of said loan, such foreman should sign verdict

number 2. If you find from the evidence that the note in suit has not been paid, or settled and adjudicated, and that no contract of usury was made, then such foreman, after filling in amount found due, should sign verdict number 3, and the verdict so found may be returned as your verdict." The forms of verdicts contemplated in this instruction given to the jury are as follows:

"VERDICT No. 1. We, the jury, find for the defendant. ———, Foreman.

"VERDICT No. 2. We, the jury, find that the amount loaned to defendant by John R. Pumphrey was ——— dollars, and that said loan was made on the ——— day of ———, 18—.

"VERDICT No. 3. We, the jury, find for the plaintiff, and assess the amount of her damages at ——— dollars. ———, Foreman."

A prior instruction, the eleventh, is to the effect that, to entitle plaintiff to recover, she must show by a preponderance of the evidence that she is the owner of the note.

II. In our opinion, the fourteenth and eleventh instructions are conflicting, and could not have failed to mislead the jury, who doubtless understood from the instructions that plaintiff was entitled to a verdict if they found the note had not been paid, and that, if they found usury, they should render verdict number 2, which they should do without inquiring into plaintiff's ownership of the note, which was put in issue by the answer. It is true, the eleventh instruction requires them to find on that issue. But to the minds of the jury this was doubtless neutralized by the fourteenth instruction. The instruction, we think, is erroneous.

III. The jury returned the following verdict, upon which a judgment was rendered for plaintiff for the amount of the loan, and for the school fund for the amount of the usury found by the court: "We, the jury, find that the amount loaned to defendant by John R. Pumphrey was $70.00, and that said loan was made on the 7th day of June, 1877. D. D. Treleven, Foreman." It will be observed that the jury in this verdict do not

find for plaintiff, nor do they find that plaintiff is the owner of the note, or that there is usury in it. The verdict clearly manifests the prejudicial effect of the error in the instruction just noticed.

IV. This verdict is not sufficient to authorize the judgment rendered by the district court against defendant. It does not show a finding upon the issue as to the ownership of the note, which should be found to authorize a verdict for plaintiff; nor does it show a finding, general or special, for plaintiff. No judgment against defendant should have been rendered on this verdict.

V. Other questions discussed by counsel need not be considered, as, for the error we have pointed out, the judgment must be reversed. The other questions argued by counsel, especially those relating to rulings on evidence, may not occur again on another trial. But, for another reason, we do not consider such questions. We have no argument for plaintiff. We always avoid, when we can, the decision of questions which have not been fully argued by counsel on both sides of the case.

REVERSED.

McCREARY v. SKINNER *et al.*

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1. **Fraud**: PROOF: DEGREE OF EVIDENCE. Fraud, like any other fact, may be established by a preponderance of the evidence; and an instruction that "it may be proved by circumstances from which the inference of fraud is natural and incontrovertible," was erroneous, as calling for too high a degree of evidence.

2. ——: IN CONVEYING GOODS: EVIDENCE: INSTRUCTION. Where the validity of a chattel mortgage from husband to wife was questioned, the court instructed the jury that before they could find fraud to exist they must find that the wife joined with her husband with the intent to carry out the purpose of defrauding his creditors, and actually participated therein, with the pretense of securing a claim owing to her by her husband. *Held* that the use of the word "pretense" was indefinite and probably misleading.

3. ——: ——: WHAT CONSTITUTES: INSTRUCTION. A conveyance of property with intent to hinder and delay creditors is fraudulent, without any intent to actually defraud; and an instruction making the intent to defraud a necessary ingredient was erroneous.

Appeal from Page District Court.—HON. GEO. CARSON, Judge.

FILED, OCTOBER 8, 1888.

ACTION to recover a stock of goods, wares and merchandise, or the value thereof. Trial by jury, verdict and judgment for the plaintiff for the value of the goods. The defendants appeal.

N. B. Raymond, for appellants.

S. C. McPherrin and *W. W. Morsman*, for appellee.

SEEVERS, C. J.—A. B. McCreary, the husband of the plaintiff, was the owner of a stock of merchandise, and in February, 1886, he executed two mortgages thereon to the Iowa State Bank of Clarinda and S. C. McPherrin, and on the same day he executed another mortgage on said merchandise to the plaintiff. The latter mortgage was subject and inferior to the first two mortgages. The defendant Skinner, as sheriff, levied upon and took possession of the merchandise under an attachment in favor of Redhead, Norton, Lathrop & Co. against A. B. McCreary. The plaintiff in this action sought to recover the possession of the merchandise, or the value thereof, her right thereto being based on the mortgage executed to her. Redhead, Norton, Lathrop & Co. intervened, and as a defense to the plaintiff's claim they and the defendant Skinner in substance pleaded that the plaintiff's mortgage had been given for the purpose of hindering, delaying and defrauding the creditors of A. B. McCreary. After the seizure of the merchandise under the attachment, Redhead, Norton, Lathrop & Co. became the owners of the two prior mortgages, and their rights thereunder are saved to them by the verdict and judgment. There was evidence tending to support the defense pleaded. The court instructed the jury as follows: "8. Fraud is not

to be presumed without proof; yet, like any other fact, it may be proved by circumstances from which the inference of fraud is natural and incontrovertible; and, if such circumstances are of such character as to produce in your mind a conviction of the fact of fraudulent intent, it will then be established. 9. Before you can find fraud to exist, the following matter must first appear and be established to your satisfaction in this case. *First.* It must be shown that A. B. McCreary was in an insolvent condition, and that he desired to circumvent his creditors, or a part of them, and prevent or hinder or delay them in enforcing their claims against him. *Second.* And you must further find that this plaintiff joined with said A. B. McCreary, with the purpose and intent to carry out such purpose (if you so find), and actually participated therein, with the pretense of securing a claim owing by A. B. McCreary to plaintiff. And you are to determine this question from all the circumstances, acts and declarations of the parties at the time of the alleged fraudulent transaction." The defendants claim that these instructions are erroneous, and their position must be sustained. The first of the above instructions is clearly erroneous, because it is there said the evidence to sustain the "inference of fraud" must be "natural and incontrovertible." Webster defines "incontrovertible" to mean "too clear and certain to admit of dispute." We believe it to be true that there never was, and probably never will be, a case where the alleged fraud is based on the acts and conduct of the parties when the evidence was or will be so certain and conclusive that a dispute as to the intention of the parties cannot naturally and legitimately arise. Certainly such must be true in this state, where the rule substantially prevails that none of the many badges of fraud usually relied on are regarded as conclusive. The instruction goes a step further than if it had said fraud must be established beyond a reasonable doubt, or that it will not be presumed, but must be satisfactorily proved. Fraud, like any other fact, may be established by a preponderance of the evidence.

1. FRAUD: proof: degree of evidence.

Lillie v. McMillan, 52 Iowa, 463; *Bixby v. Carskaddon*, 55 Iowa, 533. The word "pretense," as used in the second instruction above quoted, is objectionable. We are unable to determine what the court meant, or what the jury may have understood was the meaning of the court. The probabilities, we think, are that the jury may have been misled by the instruction, and attached an improper meaning thereto. We are unable to concur with counsel for the plaintiff that, considering the charge of the court as a whole, the foregoing instructions cannot be regarded as erroneous. The eleventh and twelfth paragraphs of the charge are objectionable for the reason that the rule is therein laid down that the defendants, in order to establish the defense, must satisfy the jury that there was an intent on the part of the plaintiff and her husband to hinder, delay and defraud the creditors of the latter; when, in fact, an intent to hinder and delay is sufficient. Whether the judgment should be reversed for this error, in view of the charge of the court, taken and considered altogether, we need not determine. The charge of the court, with the exceptions above stated, we think fully and sufficiently submitted all controverted questions to the jury, and therefore it cannot be said that the court erred in refusing the instructions asked by the defendants. Without stating our reasons at length, we deem it sufficient to say that the special findings of the jury are not so necessarily conflicting with the general verdict as to require us to direct a judgment for the defendants on such findings. There are no other errors discussed by counsel which require special notice.

2. ——: in conveying goods: evidence: instruction.

3. ——: ——: what constitutes: instruction.

REVERSED.

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PRIMMER v. PRIMMER.

1. **Will**: PROBATE: EVIDENCE: INCAPACITY AND UNDUE INFLUENCE: SUFFICIENCY ON APPEAL. A proceeding to probate a will is not triable *de novo* on appeal; and so, where the evidence, as in this case, was conflicting as to the alleged incapacity of the testator and the undue influence brought to bear upon him, the verdict of the jury cannot be disturbed in this court.

2. ——: UNDUE INFLUENCE: EVIDENCE OF. While there was no direct evidence that the proponent or any one in her behalf ever urged or solicited the testator to make the will in question, yet it appeared that she married the testator when he was on the verge of the grave, and there was evidence tending to prove that the purpose of herself and her parents and relatives in procuring the marriage to be consummated was to get possession of his property after his death, and other facts which showed that they created an opportunity to consummate such purpose by controlling the circumstances of the testator and preventing conversations with his relatives, at and prior to the time when the will was made, and it appeared that she showed no sorrow at his death, but made merry with her friends before his burial. *Held* that a verdict of undue influence based on evidence of this kind could not be disturbed in this court for want of evidence to support it.

3. ——: CONSPIRACY TO PROCURE: EVIDENCE: DECLARATIONS OF CO-CONSPIRATOR: FOUNDATION. Before the acts or declarations of an alleged co-conspirator are admissible as against another, a foundation must first be laid by proof sufficient, in the opinion of the judge, to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact. But such evidence need not be direct; and, in the nature of the case, it must usually be circumstantial.

4. ——: ——: ——: SUBSEQUENT DECLARATIONS OF CO-CONSPIRATORS. The declarations of a co-conspirator, made after the accomplishment of the common design, are not usually admissible against his co-conspirators. But the declarations of one of several co-conspirators to procure the execution of a will, made after the execution of it but prior to the death of the testator, may be shown as against a co-conspirator seeking the probate of the will, because the object of the conspiracy cannot be said to be consummated until, by the death of the testator, the possibility of cancellation or modification has passed away.

Appeal from Benton District Court—HON. L. G. KINNE, Judge.

FILED, OCTOBER 8, 1888.

PLAINTIFF is the widow, and defendant the mother, of William H. Primmer, who died on the sixth of April, 1887. After his death, an instrument purporting to be his last will and testament was filed with the clerk of the district court of the county. He left no surviving children and by the will all of his property was devised to the widow. Defendant resisted the admission of the instrument to probate, on the ground (1) that the testator, when he signed it, was incompetent, owing to physical and mental weakness, to execute a will; and (2) that the execution of the instrument was procured through the fraud and undue influence of the wife and her relatives. The issue was tried to a jury, who found that the instrument was not the will of said William H. Primmer, and the court entered judgment on the verdict refusing to admit the instrument to probate. Plaintiff appeals.

J. C. Traer and *G. W. Burnham*, for appellant

J. D. Nichols and *G. M. Gilchrist*, for appellee.

REED, J.—William H. Primmer was about twenty-two years old at the time of his death. He and plaintiff were married on the eleventh of January, 1887. He was a widower, and had been in failing health for more than a year. The disease with which he died was consumption of the lungs. He had been advised by a physician to go to a warmer climate, and on the day after the marriage he started to the state of Kansas, being accompanied by his mother. He was not benefited by the change of climate, but, on the contrary, his disease grew worse, and on the ninth of March they returned to the family home in Benton county. At that time he was weak, and much emaciated. He remained

1. WILL: probate: evidence: incapacity and undue influence: sufficiency on appeal.

there about one week, when he was taken to the home of his wife's father, where he remained until the day on which he died; when, at his own request, he was again removed to his mother's home, but died in a few hours after he arrived there. It was during the time that he was at the house of his father-in-law that the will was executed. The district court instructed the jury, in effect, that the instrument would not be defeated on the ground of the incapacity of the testator, unless it was shown that, at the time of its execution, he was incapable of weighing and comprehending the effect of the disposition he was making of his property, and of exercising reason and judgment with reference to the act. Also, that before they could find for the contestant on the other ground alleged, they must find that he was under an influence which amounted to coercion or restraint, and, in effect, destroyed his free agency; and that the instrument was not the expression of his own desire or will, but that of the persons by whom he was influenced. No exceptions were taken to the charge; but it was contended by counsel that, under the instructions, the finding should have been the other way, and that it finds no support in the evidence. It may be that if the cause was for trial here anew, and we were required to determine the question as to the sufficiency of the evidence, we would reach a conclusion contrary to the finding of the jury. On the question of the want of capacity of the testator the evidence appears to us to be weak; but on that question, even, it cannot be said that there was no evidence which tended to establish the allegation that he was not capable of disposing of his property. The testimony of the scrivener who wrote the will tended strongly to prove that he comprehended the nature of the act he was doing, and its consequences, and that he was capable of exercising judgment and reason with reference to it. But, on the other hand, one of the subscribing witnesses to the will testified that he was very weak, both in body and mind, and that he was apparently in a condition of stupor, from which it was

difficult to arouse him; and other witnesses, who saw him shortly before and after, testified to substantially the same state of facts. There was a conflict in the evidence, then, upon that question, and different minds might fairly arrive at different conclusions with reference to it.

And the same is true as to the other allegation. There was no direct evidence that either the proponent or any of her relatives ever urged or solicited the testator to execute the will, or make that particular disposition of his property. But a course of conduct on her part, and on the part of her parents, was proven, the fair inference from which is that the only object they had in view when the marriage was consummated was to obtain possession of his property. Both she and they knew at the time of the marriage that he was on the verge of the grave. They knew, also, that he contemplated going to Kansas on the next day after the marriage in quest of health; and, at the solicitation of her father, his mother became his traveling companion and attendant on the journey, the wife remaining with her parents; and it was at their solicitation, and by their procurement, that he was removed, after his return, from the home of his mother to that of his father-in-law. And, while there, no opportunity was given his relatives to converse with him, except in the presence of the father-in-law, or some member of his family. None of his relatives were present when the will was executed, and this does not appear to have been entirely accidental. On the day of the marriage he executed a conveyance of his farm to the father-in-law, who, after his death, conveyed it to the widow. While it was shown that plaintiff treated her husband with kindness during his sickness, it was also made to appear that she felt no sorrow or bereavement at his death; for it was shown that she "made merry" with her young associates and friends before his body was borne to the grave. From these and other circumstances which were proven, the jury were warranted in concluding that the marriage was, on her part, a purely

2. ——: undue influence: evidence of.

mercenary venture. It was also shown that the father-in-law had obtained a great influence over him, and the evidence affords abundant grounds for the belief that he was under that influence when he executed the will. It is to be borne in mind that in disposing of the case we are governed by the rules applicable to ordinary actions. It is not triable *de novo* in this court. *Sisters of Visitation v. Glass*, 45 Iowa, 154; *Ross v. McQuiston*, 45 Iowa, 145; *In re Donnely*, 68 Iowa, 126. As to these questions, then, the case falls within the settled rule that, when the verdict of the jury or the finding of the trial court involves the determination of a question of fact as to which there was a conflict in the evidence, or a deduction from proven facts which could be fairly arrived at from those facts, it will not be disturbed.

3. ——: conspiracy to procure: evidence: declarations of co-conspirator: foundation.

Exception was taken to the order of the court admitting evidence of certain acts and declarations of the father and mother of plaintiff, done and made both before and after the execution of the will. The evidence was offered under the claim that a conspiracy had been entered into by plaintiff and her father and mother, the object of which was to obtain possession of the property; and that the marriage, the obtaining of the conveyance of the farm to the father, and his subsequent conveyance to her, and the procuring of the execution of the will, were all done in pursuance of that design. It was not denied that the rule is that the acts and declarations of one of a company of conspirators, done and made in pursuance of the concerted plan, are admissible as against all of the others. But it was contended that the foundation for the admission of the evidence was not laid by proof of the formation of the conspiracy alleged. The rule certainly is that, before the acts or declarations of an alleged co-conspirator are admissible as against another, a "foundation must first be laid by proof sufficient, in the opinion of the judge, to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact." 1 Greenl. Ev. sec. 111. It must be admitted

that there was no direct evidence of a conspiracy between the parties; but such fact can seldom be proven by evidence of that character. It rarely happens that men publicly enter into combinations for the accomplishment of designs which can be effected only by secret means, and hence it is that the fact of such confederation can seldom be proven except by circumstantial evidence. As stated above, the acts and conduct of the parties were proven, and these had some tendency to show that they were acting in concert, and in pursuance of common designs. It does not appear whether the court, by its order, intended to hold that the circumstances proven afforded *prima-facie* evidence of the conspiracy, or only that they afforded sufficient grounds for submitting the question to the jury. In either view, however, we could not disturb the judgment because of the ruling; for if the court found that the evidence established, *prima facie*, the existence of the conspiracy, the finding is not without support; and if the intention was to submit the question to the jury, the evidence was properly admitted, to the end that the jury might consider the acts and declarations, if they found the fact of the conspiracy established.

But it was contended that the object of the conspiracy, if one existed, was to obtain the execution of the will; and hence the evidence of the acts and declarations subsequent to that were not admissible. It is true that the acts and declarations of co-conspirators, after the accomplishment of the common design, are in the nature merely of admissions, and are admissible only against the one doing or making them. But the object of the conspiracy in the present case, if one existed, could be consummated only at the death of the testator; for until that happened the design might be defeated by the modification or cancellation of the will. It included, therefore, the doing of whatever might be necessary to prevent such modification or cancellation, and it continued until his death. The court did not instruct the jury as to the

4. —: —: —: subsequent declarations of co-conspirators.

effect of the evidence of the acts and admissions of plaintiff's father and mother, and she may have been prejudiced by that failure. But, as stated above, no exception was taken to the charge; nor has such omission been assigned as error. We cannot, therefore, consider that question. We do not find in the record any ground for disturbing the judgment, and it will be

AFFIRMED.

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VAN HORN v. OVERMAN, INTERVENOR.

1. **Pleading**: REPETITION: STRIKING OUT. A party is not prejudiced by striking out a portion of his answer, when the same defense is set up in another part of his answer which is allowed to stand.

2. **Practice**: STRIKING OUT PLEA: RESTORATION AFTER EVIDENCE CLOSED: FURTHER EVIDENCE: PREJUDICE WAIVED. The court sustained a motion to strike out a division of plaintiff's answer designed to plead an estoppel. After the evidence had been offered and the argument to the jury begun, the court concluded that an estoppel had been well pleaded, and offered plaintiff the privilege of introducing evidence on that issue. Plaintiff then introduced one witness, but did not ask for delay to procure other evidence, and made no objection to proceeding at once to the submission of the case to the jury. *Held* that it was the privilege and duty of the court to correct its ruling, if found to be erroneous, but that it was plaintiff's duty to ask for such further action as would save him from prejudice after such correction; and that, having consented to the submission of the cause, he could not, on appeal, be heard to complain that he was prejudiced by the court's action.

3. **Evidence**: ABILITY TO WRITE: HEARSAY. Intervenor introduced papers purporting to be signed by H. Plaintiff, in order to show that H. could not write his name, offered evidence to prove that he employed others to write for him, and that he did not keep his account-book in writing. *Held* that this was properly excluded as proving nothing as to his ability to write his name; and that his statements to others that he could not write were properly excluded as hearsay,—he not being a party to the suit.

4. **Estoppel**: OWNERSHIP OF PROPERTY IN ANOTHER'S POSSESSION. Where plaintiff bought property of H., which H. had in his possession and claimed to own, but which he had previously sold to intervenor, *held* that intervenor was not estopped to set up his claim to the property unless he had knowledge of the acts of H., nor unless plaintiff relied upon the conduct of intervenor, as showing title in H., when he made his purchase.

5. **Instructions:** SPECIAL INTERROGATORIES. It was not error to refuse to submit special interrogatories when no answers which could have been made to them would have shown that the general verdict was wrong.

6. ——: REPETITION. There was no error in refusing instructions asked, when so much of them as was correct and material to the case was given by the court in its charge.

7. **Replevin:** INTERVENTION: AGREEMENT TO RELEASE DEFENDANT: CONSTRUCTION. In an action for property levied upon by a constable, a third person claiming the property intervened, and it was agreed that the constable should be discharged from the case, that no judgment for damages or costs should be rendered against him, and that the property should be regarded as in the hands of the court, subject to a final determination between plaintiff and intervenor. It did not appear that the intervenor was a party to the agreement. *Held* that it did not have the effect to release plaintiff from liability to the intervenor on account of the use and detention by him of the property, which was in his hands for a long time, and at the time the agreement was made.

Appeal from Montgomery District Court.—HON. C. F. LOOFBOUROW, Judge.

FILED, OCTOBER 8, 1888.

ACTION to recover specific personal property. It was commenced by plaintiff in August, 1882, against S. H. Redmon, constable. In October, 1882, B. Overman intervened, claiming to be the owner of the property, and the proceedings thereafter had were between plaintiff and intervenor. The cause was first tried in April, 1884, and verdict and judgment were rendered in favor of intervenor. That judgment was reversed, on appeal to this court. 67 Iowa, 689. A second trial in the court below resulted in a verdict and judgment in favor of the intervenor, and plaintiff again appeals.

W. H. Redmon, *W. S. Strawn* and *F. M. Davis*, for appellant.

J. M. Junkin and *S. McPherson*, for appellee.

ROBINSON, J.—The property in controversy consisted, in 1882, of two colts, which were at one time owned by Wesley Hall. Plaintiff claims that he purchased the colts of Wesley Hall, in August, 1882. On

the part of intervenor it is claimed that Wesley Hall sold the colts to C. H. Hall, on the eighth day of October, 1881, and that C. H. Hall sold them to intervenor after the alleged purchase by plaintiff. The material questions for the jury to determine were whether the purchase alleged to have been made by C. H. Hall was actual, and in good faith, and whether his conduct after the alleged purchase was such as to estop him and his vendee from asserting title against the plaintiff.

I. After the cause was remanded for a second trial, the plaintiff filed an answer to the amended petition of intervenor. On motion of intervenor portions of the first and third divisions of this answer were stricken out. Appellant insists that a plea that the purchase by C. H. Hall was a fictitious pretense was stricken from the first division. The record does not sustain this claim. No allegation of that nature appears in the first division, but it does appear in a part of the third division, which was not disturbed. Even had it been stricken out, as claimed, no prejudice would have resulted, for the reason that the second division of the answer put the facts involved in C. H. Hall's purchase in issue.

1. PLEADING: repetition: striking out.

II. Portions of the third division of the plaintiff's answer, which were stricken out, were designed to plead an estoppel. After the evidence was closed, and the argument of counsel to the jury had been commenced, the court concluded that an estoppel had been sufficiently pleaded, and offered to the plaintiff the privilege of introducing any further evidence he might have in support of the estoppel alleged. Plaintiff thereupon introduced one witness, but did not ask for delay to procure other evidence, and made no objection to proceeding at once to a submission of the case to the jury then impaneled. Appellant now insists that the action of the court in striking out the plea of estoppel was reversible error, and that it was not cured by the subsequent action of the court. He claims that he was necessarily hampered in the introduction of his testimony

2. PRACTICE: striking out plea: restoration after evidence closed: further evidence: prejudice waived.

to his prejudice, and that the jury were improperly influenced by the method which he was compelled by the court to follow, and that the cause should not have been submitted to that jury. A change of ruling ought to be avoided, if practicable; but where an erroneous ruling is made, the trial court ought to correct it, and take such further action as is practicable to prevent prejudice from the correction. But it was the duty of appellant to ask for further time, if needed, and to object to a submission to the jury then impaneled, if there was any valid objection to it. *Hopper v. Moore*, 42 Iowa, 566. He did not, however, ask for further time; nor did he object to the jury. The evidence which had already been submitted was in large part of a nature tending to establish the plea of estoppel. Therefore there was no reason, so far as is disclosed by the record, why the cause should not have been submitted at once.

III. Intervenor offered in evidence two papers, purporting to be signed by "Wes. Hall," and alleged to have been given to C. H. Hall on the eighth day of October, 1881, in connection with his purchase of the colts. One was a receipt for money, and the other was an acknowledgment of the sale of the colts. It was claimed on the part of intervenor that Wesley Hall signed these papers, while plaintiff claimed that Hall could not write his name. Appellant now insists that the court erred in refusing to receive evidence offered by him in regard to Wesley's ability to write. We do not think error in this respect is shown. Some of the rejected evidence was designed to show that Wesley had employed others to write for him; that he did not keep his account-book in writing; and that he had said he could not write his name. He was not a party to the suit, and his statements to others as to his ability to write would not be the best evidence of the fact. His method of keeping his accounts, and his having others to do some of his writing, would not prove anything as to his ability to write his name. The court permitted witnesses to

8. Evidence: ability to write: hearsay.

testify that he could not sign his name, and that he did not sign it in certain cases. No competent evidence tending to show his ability to write his name was excluded, while some evidence of a hearsay character was admitted on the part of plaintiff.

IV. Appellant complains of certain paragraphs of the charge to the jury in regard to the defense of estoppel. Some of the evidence tended to show that Wesley Hall had possession of the colts, at times, after C. H. Hall had purchased them. The court charged the jury in regard to this possession that, before they could find an estoppel proven, they must find, not only that Wesley Hall had possession of the colts and claimed to still own them, but that C. H. Hall knew Wesley had them in his possession, and knew he was claiming them as his own, and with this knowledge permitted Wesley to still retain the possession, and claim them as his own. The first of the two paragraphs objected to gives the law substantially as claimed by appellant. The second explains that C. H. Hall would not be bound by acts of which he had no knowledge. We think this was the law as applicable to the facts in this case. The answer of appellant charges that C. H. Hall treated Wesley as the owner of the colts, and told several persons that he was such owner. If C. H. Hall was estopped by any facts pleaded, it was because the acts were performed with knowledge of the facts, and not inadvertently. Another answer to appellant's complaint is that he does not show that he relied upon any acts or statements of C. H. Hall in purchasing of Wesley, and therefore, if the charge was erroneous, no prejudice could have resulted from it.

4. ESTOPPEL: ownership of property in another's possession.

V. The action of the court below in refusing to submit to the jury seven special interrogatories asked by plaintiff is alleged to be erroneous. We discover no error in this action. The facts sought to be elicited by the interrogatories were not of such a nature as to have controlled the general verdict. No answers which could have been made to them would show that the general verdict was wrong.

5. INSTRUCTIONS: special interrogatories.

VI. Five instructions were asked by plaintiff, and refused. So much of them as was correct and material to the case was given by the court in its charge. There was therefore no error in refusing those asked.

6. ——: repetition.

VII. The plaintiff offered in evidence an alleged agreement in the following language: "It is agreed that there shall be no judgment for damages or costs taken against the defendant S. H. Redmon; that the property in controversy is to be regarded as being in the hands of the court, subject to a final determination as between the parties plaintiff and intervenor; and that the defendant be discharged from the case." It is not shown that this writing was signed by any one, nor that it was made in this case. But, conceding that it was made in open court, and in this case, it is not shown that intervenor was a party to it. Appellant insists that it had the effect to release plaintiff from liability on account of the property in controversy. It is conceded that he has been in possession of it since 1882. We do not think the record sustains appellant's claim. The purpose of the agreement seems to have been to release the constable from further liability, and to permit plaintiff and intervenor to continue the contest in their own names. It cannot be presumed that the parties designed that plaintiff should have the use and profit of the property for a series of years without any liability to account for the property, or damages for its detention. The property certainly was not in court as to plaintiff and intervenor.

7. REPLEVIN: intervention: agreement to release defendant: construction.

VIII. Appellant contends that the verdict is contrary to the evidence and the law; that it is excessive, and the result of passion and prejudice. There was much conflict in the evidence, but there was certainly enough to support the verdict in all respects, and it cannot be disturbed for want of evidence. Other questions are discussed by counsel, but we discover nothing in

them of sufficient importance to require extended mention. We find no error in the case prejudicial to appellant. AFFIRMED.

HOXIE V. SHAW.

1. **Counties: SELECTION OF OFFICIAL NEWSPAPERS: CONTEST: APPEAL.** Where a newspaper has been selected to do the county printing, under chapter 197, Laws of 1884, subject, however, to a contest as provided by that chapter, no appeal can be taken until there has been final action upon the contest.

2. **———: ———: TIME FOR ACTION.** Although the statute provides that the board of supervisors shall select the newspapers to do the county printing at its January term, that provsion does not prevent the board from taking final action upon a contest at a subse quent term, when the business has been entered upon at the January term, but for some reason (the equal division of the members present, in this case) final action could not sooner be reached.

Appeal from Adams District Court.—HON. JOHN W. HARVEY, Judge.

FILED, OCTOBER 9, 1888.

THE board of supervisors of Adams county took action under chapter 197, Acts Twentieth General Assembly, to determine in which newspaper of the county the proceedings of the board of the county should be published. From this action the plaintiff appeals.

Dale & Brown, for appellant.

H. T. Granger and *Davis & Wells*, for appellee.

BECK, J.—I. The publishers of the three newspapers presented applications and proofs to the supervisors, as required by chapter 197, Acts Twentieth General Assembly, upon which they sought to secure the printing authorized by that act. The statute authorizes the supervisors to select two newspapers printed in the county, in which the proceedings of the board, etc., shall be published.

1. COUNTIES: selection of official newspapers: contest: appeal.

One of the newspapers was selected without any objection, and another was selected subject to a contest as contemplated by the statute. The plaintiff was the contestant, and the defendant was the publisher of the paper so selected conditionally. A time was fixed for determining the contest, and a prior time was prescribed for filing specifications for the contest, which were to be supported by proof the day for the decision of the contest. It is not shown that such proofs were filed. Indeed, we are authorized to infer from the statements of the abstract that none were filed. On the day set for the determination of the contest by the supervisors a motion was made that the board proceed therewith. There were four supervisors present. Two voted for and two against the motion. The motion did not prevail. At the subsequent day a motion to dismiss the contest was offered, but there was a tie vote, and the resolution was not, therefore, adopted. This action left the matter undisposed of. The first action, or, rather, failure to act, operated to postpone it. The second left the contest pending, to be disposed of thereafter. It plainly appears that there was no final action upon the contest, and that it is still pending. There was therefore no action so affecting plaintiff's rights as bestows authority to appeal. The contest is still pending before the supervisors.

II. But counsel for plaintiff insist that, as the question is to be determined, under the provision of the statute, at the January term of the board, that body has no authority to act at a subsequent session. The statute directs the board to make the selection at the January session. The power conferred is to make the selection. The time when it is to be done is prescribed. Now, surely, if the board takes action looking to the selection, but for any reason cannot complete it, as for the reason of an equal division, occasioned by the absence of one of the supervisors, which we understand was the fact in this case, the business is left pending, to be disposed of as soon as the supervisors all meet or do agree. It cannot be that

2. —: —: time for action.

power to do an act, which is directed to be done on a fixed day, will be defeated for the reason that the course which the law prescribes for the exercise of the power cannot, for reasons recognized by the law, be pursued. The contest is to be settled by a majority vote, which could not be had. The matter must go over for future consideration. The law will not defeat the power of the supervisors, but will rather require them to exercise it in the manner required by law. See *Carter v. McFarland*, *ante*, p. 196. We reach the conclusion that the district court rightly sustained a motion to dismiss the appeal. AFFIRMED.

SEDA *et al.* v. HUBLE *et al.*

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WILL: BEQUEST IN TRUST FOR UNINCORPORATED CHURCH: CONDITIONS: VALIDITY. A testator devised a certain sum to certain persons in trust for the benefit of the Catholic church on his farm, and directed that they or their successors should invest said money safely for the benefit of said church, and that services should be held in said church for his soul yearly. *Held*—

(1) That the bequest was for a charitable use, clearly defined.

(2) That the title to the money vested in the trustees, and it was immaterial that the beneficiary church was not, and could not be, incorporated.

(3) That the bequest was not invalid on the ground that there was no one to call the trustees to account for a misuse of the fund.

(4) That it was not invalid because the testator conditioned it upon services being held yearly for his soul; that paragraph of the will being simply a request rather than a condition.

Appeal from Tama District Court.—HON. L. G. KINNE, Judge.

FILED, OCTOBER 9, 1888.

ACTION in equity. The facts are stated in the opinion

W. H. Stivers and *F. J. Horak*, for appellants.

Struble & Stiger and *Caldwell & Drahos*, for appellees.

SEEVERS, C. J.—It is stated in the petition that Albert Patranek died in 1881, and that his last will had been duly admitted to probate; that the plaintiffs are the heirs of the deceased, and that the estate has been fully settled except as to the following bequest made in said will; that is to say: "I hereby give, devise and bequeath to Franz Sevcik and Fred Huble, in trust for the benefit of the Catholic church on my farm in Tama county, the sum of eight hundred dollars, and hereby direct that they or their successors shall invest said money safely for the benefit of said church, and that service be held in said church for my soul yearly." The plaintiffs claim in the petition that the bequest is void because the same is not for a charitable use; the church mentioned in the devise has no legal existence and is not incorporated, and cannot be, under the rules of the Catholic church and the statutes of this state. There was a demurrer to the petition, which being sustained, the plaintiffs appeal.

The devise is to Franz Sevcik and Fred Huble, in trust for the benefit of a specified Catholic church. The parties named were to safely invest the money for the benefit of such church. This bequest, in our opinion, was for a charitable use, which was clearly identified. The intention of the testator is clearly expressed. There cannot be any doubt or uncertainty about it. Why should it not be upheld and carried into effect? Because, it is said, the church indicated has no legal existence. This we understand to mean that it has not been incorporated; but clearly this is not material. The legal title to the money is in the persons named, coupled, however, with a trust. The beneficiary named is the "Catholic church on my farm, in Tama county, Iowa." Such church, or those who worship in the church edifice, are entitled to the benefits of the bequest. It clearly is not essential that such body of persons should be incorporated. It was so held in *Johnson v. Mayne*, 4 Iowa, 180.

Nor is it material, if true, as counsel contend, that the Catholic church is prohibited from taking or "holding any property whatever;" because the money is not

devised to the church, but to the parties named in the will. They take the money coupled with a beneficial interest, but in trust, to invest the same safely for the benefit of the church. They therefore are legatees charged by the testator with the duty of executing a charitable use and the benevolent purpose of the testator. *Perry v. Drury*, 56 Iowa, 60.

Possibly the trustees may misuse the fund devised to them. Who is to call them to account? is asked by counsel. In reply it is sufficient to say that "it is the settled doctrine of the courts, in the construction of wills and the administration of trusts, that a trust shall never be permitted to fail through the failure or disability of the trustee to execute the trust, but shall be supported upon the intention of the testator; that the trust is attached to and fastened to the land, and that the land remains chargeable with it in the hands of the heirs or devisees." *Johnson v. Mayne*, 4 Iowa, 195; *Miller v. Chittenden*, 4 Iowa, 252.

It is said the devise is void because the testator made it upon the condition that services were to be held yearly in said church for the soul of the testator. We do not understand that the bequest is based on such condition. That the testator desired that such services should be held, may be conceded; but that it was his intention that, if they were not, the bequest was to cease or not take effect, we do not believe. The devise took effect at once, and attached to the money. The trustees could enforce the trust. They could maintain the action for the recovery of the money, and the trust attached thereto in their hands. It became their duty to invest it as directed. The trust was then, it can be fairly said, executed, and in no respect was it conditional on the performance of the yearly services named, and such was not the intention of the testator.

To our minds the bequest is so clearly expressed, the trust so certainly established, and the beneficiary so clearly indicated, that it is unnecessary to support the foregoing view by a citation of authorities to any greater extent than has been done. AFFIRMED.

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THE STATE v. DOUGLASS & HOPKINS *et al.*

1. **Saloon Nuisance**: TEMPORARY INJUNCTION WITHOUT NOTICE: PERMANENT INJUNCTION ON HEARING: APPEAL. Where on the final hearing the district court perpetually enjoins a saloon nuisance, and an appeal is taken from that decree, it will not be reversed for an error in granting a temporary injunction without notice to the defendants. (*Hughes v. Eckerson*, 55 Iowa, 641, *distinguished*).

2. ——: INJUNCTION: ACTION IN NAME OF STATE: ATTORNEY'S FEE. Under section 1, chapter 66, Laws of 1886, attorney's fees are taxable against the unsuccessful defendant in all cases brought to enjoin liquor nuisances, whether prosecuted in the name of the state by the county attorney, or in the name of a citizen of the county.

3. ——: ——: EVIDENCE AGAINST LESSORS OF BUILDING. In an action to enjoin the use of leased premises as a liquor nuisance, the nuisance was proved, and it appeared that the lessors knew that the building was fitted up with a bar and other appliances for the sale of drinks. *Held* that this was sufficient to justify a decree against them, in the absence of a showing that they in good faith leased the premises for lawful purposes.

Appeal from Union District Court.—HON. JOHN W. HARVEY, Judge.

FILED, OCTOBER 9, 1888.

THIS is an action in equity to enjoin and abate a saloon nuisance. The suit was commenced in the name of the state by the county attorney. There was a general denial on the part of the defendants, and upon a trial a decree was entered providing for the abatement of the alleged nuisance. Defendants appeal.

D. W. Higbee and *James W. McDill*, for appellants.

A. W. Enoch, County Attorney, and *Enoch & Winter*, for appellee.

ROTHROCK, J.—I. The first question presented in the case is the complaint made by defendants that the

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court ordered a temporary injunction without notice to the defendants. It is claimed that the statute requires a notice of the application for the writ in all cases where an injunction is sought to enjoin the keeping of a nuisance. The temporary injunction granted by the judge in vacation. The defendants vered, and filed a motion to dissolve the injunction, the ground that it was ordered without notice. motion was overruled on the twenty-ninth day of ember, 1887, and upon the same day the trial was upon the merits, and on the next day the perpetual nction was ordered by final decree. We do not find cessary to determine in this case whether a tempo- injunction may be granted without notice in an action njoin the keeping of a saloon nuisance. As the was commenced immediately upon the overruling he motion to dissolve, the defendants were not udiced by the ruling. The court found, upon a upon the merits, that the defendants should be ined; and the temporary injunction deprived them of egal right pending the trial. It appears from the ract that an appeal was taken generally. It is shown affirmatively that the defendants appealed the order overruling the motion to dissolve the porary injunction. In the case of *Hughes v. Eck-n*, 55 Iowa, 641, where we held that an injunction estrain a nuisance can be granted only on notice to party to be enjoined, the appeal was taken from an r overruling a motion to dissolve. It does not ear that any final decree was entered in that case. he case at bar a trial upon the merits was had, and rpetual injunction was granted. If the petition had filed, demanding an injunction, and an original ce served, and the defendant answered, and a trial upon the merits, the court would have been author- to enter a permanent injunction without having ited a temporary writ. What we hold is that, where appeal is taken from a final decree, it should not be

reversed because the court granted a temporary injunction without notice. If we were to reverse the ruling on the motion to dissolve, it would not affect the final decree, if it was rightfully granted.

II. It is claimed that the evidence did not establish the fact that the defendants Douglass & Hopkins, who were the lessees and keepers of the house in question, were guilty of keeping and maintaining a nuisance. We think otherwise. It appears to us that it was shown by a fair preponderance of the evidence that the said defendants kept a nuisance upon the property and in the building described in the petition, contrary to the statute in such cases provided.

III. It is further insisted that the court erred in allowing and taxing an attorney's fee for the attorneys who conducted the suit in the behalf of the plaintiff. The action was commenced and carried on by the county attorney. It is claimed that an attorney's fee can be taxed only when the action is by a private citizen of the county. We think, however, that, under section 1, chapter 66, Acts 1886, attorney's fees are taxable in all cases, whether prosecuted in the name of the state or in the name of a citizen of the county. We do not think the law is susceptible of any other fair construction.

2. —: injunction: action in name of state: attorney's fee.

IV. It is claimed that the evidence did not authorize an injunction against the defendants Krauer & Hoffman, the owners and lessors of the buildings. It appears that they were and are residents of the city of Ottumwa. They relied upon a general denial of the averments of the petition. They did not, as in *Drake v. Kingsbaker*, 72 Iowa, 441, and *Shear v. Brinkman*, 72 Iowa, 698, make any showing that they acted in good faith in making the lease of their property. They were doubtless aware that the building was fitted up with a bar and other appliances for the sale of drinks. The evidence was, we think, sufficient to require them to show that they in good faith leased the business for lawful purposes.

3. —: —: evidence against lessors of building.

AFFIRMED.

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REDFIELD V. REDFIELD.

1. **Evidence:** ERROR IN ADMITTING: CURED BY INSTRUCTION. The admission of improper evidence in this case was no ground for reversal, where the court in its charge directed the jury not to consider it, especially as the same evidence had, in substance, already been given, without objection on the part of the appellant.

2. **Assault and Battery:** PRIOR CONDITION OF PLAINTIFF: EVIDENCE. In an action for a personal injury, an inquiry into the plaintiff's physical condition eighteen months prior to the injury complained of is immaterial, where no connection between that condition and her condition at the time of the alleged injury is shown or pleaded.

3. **Evidence:** EXCLUSION: SUBSEQUENT ADMISSION IN SUBSTANCE. A party suffers no prejudice from the exclusion of testimony which he is afterwards, without objection, allowed to give in substance.

4. **Assault and Battery:** IRRELEVANT EVIDENCE IN DEFENSE. In an action for an assault and battery committed by a master upon his servant, evidence as to how the chores were done by the servant in his absence was immaterial, as a neglect of the chores would not justify the assault and battery.

5. ——: EJECTION OF TENANT: INSTRUCTION. In an action for an assault and battery committed by defendant in ejecting plaintiff from his house, the court instructed the jury that if plaintiff and husband had been occupying the house with defendant's consent for more than thirty days, then defendant could not eject them without process of law. *Held* that, though plaintiff's tenancy was not in issue by direct averment, the charge was justified by defendant's plea that he had rightfully ejected plaintiff, and by the evidence offered on that issue.

6. ——: EJECTMENT FROM HOUSE: NOTICE: INCLEMENT WEATHER. In such case the court instructed that if plaintiff and her husband were boarding with defendant as his employes, still he had no right to eject plaintiff without reasonable notice to enable her to go peacefully, and that defendant would have no right to eject her at unreasonable hours nor in inclement weather, unless she was at the time conducting herself so as to disturb the peace of defendant's household. *Held* that this instruction was justified by evidence that defendant said: "I'll give you until to-morrow morning to get out of here, and, if you don't go, I'll put you out," and that, upon plaintiff saying, "I don't have to get out," he at once ejected her at night and in inclement weather.

7. ———: MITIGATION OF DAMAGES: BELIEF OF DEFENDANT. In such case, the court instructed that if defendant acted under the belief that he had a right to eject plaintiff, that fact might be considered in mitigation of his acts, even if they were unlawful. *Held* correct, where the effect of such finding on the question of malice and exemplary damages was properly presented in other instructions.

8. ———: EJECTION OF WOMAN FROM HOUSE AT NIGHT AND IN BAD WEATHER: EXCESSIVE VERDICT. In this case it appeared that defendant, violently and without any just cause, ejected plaintiff, —a woman in delicate health,—from his house at night and when the weather was inclement, whereby she sustained injuries, and was compelled to seek shelter at the house of a neighbor. *Held* that a verdict for six hundred dollars actual damages and one thousand dollars exemplary damages could not be disturbed, on appeal, as being excessive.

Appeal from Page District Court.—HON. A. B. THORNELL, Judge.

FILED, OCTOBER 9, 1888.

PLAINTIFF seeks to recover for injuries alleged to have been inflicted by defendant. The cause was tried to a jury, and a verdict returned in favor of plaintiff. Judgment was rendered on the verdict, and defendant appeals.

Jas. McCabe and *W. P. Ferguson*, for appellant.

C. S. Keenan, for appellee.

ROBINSON, J.—The petition of plaintiff states "that on the thirteenth day of February, 1887, while in the discharge of her household duties, she was wilfully and maliciously assaulted by the defendant, by him striking and choking her, and pushing her through the door of her dwelling, and off the porch—several feet high—onto the ground, from which she was unable to rise for a short time; that the night was cold and wet, and she was compelled to seek shelter in a neighboring house, being at the time in poor health, which fact was known by defendant at the time; that she had been greatly injured in her person and health, humiliated and distressed in mind, and suffered great mental agony and

bodily pain; for which she claims damages in the sum of five thousand dollars." The defendant admits that he forcibly ejected plaintiff from the dwelling in which she was then staying, but avers that he was the owner and in the rightful possession of the same; that plaintiff and her husband were at that time in his employ; but that, having failed to perform their duties properly, he discharged them, and notified plaintiff to leave the premises, which she refused to do, but asserted a right to remain; that he thereupon ejected her, using no more than necessary force in so doing, He denies the allegations of the petition not admitted. The evidence seems to show that at the time in question defendant resided with his family in Shenandoah, but owned a farm a few miles from the town, where he fed and kept stock. In December, 1886, the plaintiff and her husband, who is a son of defendant, moved onto the farm, and commenced attending to the stock. At the time in question, some controversy arose as to the manner in which the chores were done, some abusive language was used, and the plaintiff was forcibly ejected from the house.

I. This action was commenced on the twenty-third day of March, 1887, and tried on the fourth day of November of the same year. Appellant complains of the ruling of the court in permitting plaintiff to answer the questions, "Are you able to work now?" and "For what reason?" The answer to the first question was: "I have not commenced to work, but had thought of commencing and trying to work; don't know whether I am able to work or not until I have tried. I have tried. I have been unable this summer." And to the second: "My back has been so lame I could not work." The court charged the jury not to consider the evidence of plaintiff touching the conditon of her health and the pain endured by her after the commencement of the suit. This withdrew from the jury so much of these answers as was responsive to the questions, and the latter only were objected to. We conclude that if there was error in the ruling it was cured by the charge. The

1. Evidence: error in admitting: cured by instruction.

plaintiff was permitted to testify, without objection, that the injury resulted in laming her back and arm so that she had not been able to work, and was cross-examined at considerable length as to her physical condition, both before and after she received the injuries in controversy. We do not think appellant has any reason to complain of the rulings in question, in view of the previous examination of the witness, and the charge of the court.

II. The plaintiff stated, on cross-examination, that she hurt her back July 4, 1885, and that at that time she was taking medicine, but not for her back. Defendant then asked her, "What complaint was the medicine for?" and now complains that an objection to the question was sustained. We think the ruling was correct. The time to which the question referred was more than a year and a half before defendant committed the acts of which she complains, and no connection between a disease which existed in July, 1885, and her physical condition in February, 1887, is shown or alleged.

2. ASSAULT and battery: prior condition of plaintiff: evidence.

III. Appellant complains of the ruling of the court in sustaining an objection to a question asked of defendant as follows: "What right did plaintiff or husband have there?" It is true, an objection to this question was sustained, but defendant afterwards stated the terms under which these persons were in the house, and no prejudice could have resulted from the ruling.

3. EVIDENCE: exclusion: subsequent admission in substance.

IV. The court below refused to allow defendant to state how the chores were done in his absence. We think this ruling was correct. It was immaterial to the issues of the case whether the chores were properly done or not. Certainly it would not justify defendant's acts, nor show that they were without malice, to prove that the chores were neglected.

4. ASSAULT and battery: irrelevant evidence in defense.

V. Appellant complains of the eighth paragraph of the charge, on the ground that it submitted to the

5. ——: ejection of tenant: instruction.

jury questions not in issue, and of which there was no evidence, and that it was misleading. It instructed the jury that if plaintiff and husband were occupying the house with defendant's consent, and had been so occupying it for more than thirty days, then defendant could not eject them, except by process of law. It is said that the question of plaintiff's tenancy at will was not in issue. It was not in issue by express averment, but the charge was justified by defendant's plea that he had rightfully ejected plaintiff, and by the evidence offered on that issue. The

6. ——: ejectment from house: notice: inclement weather.

paragraph of the charge under consideration further instructed the jury that if plaintiff and husband were boarding with defendant as his employes, still he had no right to eject plaintiff without reasonable notice to enable her to go peacefully, and that defendant would have no right to eject her at unreasonable hours, nor in inclement weather, unless she was at the time conducting herself so as to disturb the peace of defendant's household. Appellant complains of this on the ground that the evidence shows without contradiction that the reasonable notice was given and rejected. The plaintiff's testimony on this point was that "defendant said: 'I'll give you until to-morrow morning to get out of here, and, if you don't go, I'll put you out.' I said, 'I don't have to get out.' When I said that he became very angry, got up and opened the door into the hall, and the outside door onto the porch and came back to me. When about two feet from me, I raised my arms, and said: 'Don't lay hands on me.' He grabbed me by the left arm, and jerked me out of my chair, and knocked me on the back of my head, and sent me across the room to the partition; and, if I had not raised my hand, I would have gone against the wall. Before I could straighten up he grabbed me again by my left arm, and jerked me through the door opening into the hall, and from there through the east door to the porch, when he struck me behind the shoulders, which sent me off the porch two or three feet high, saying: 'Now go,' and slammed the door behind me." The portion of

the charge in regard to reasonable notice was given in connection with that which instructed the jury that plaintiff could not be ejected at an unreasonable hour, nor in inclement weather. In other words, the jury were told that the giving of reasonable notice to leave did not authorize defendant to eject the plaintiff at an unreasonable time. As applied to the facts in this case, the charge was correct. If plaintiff was entitled to notice in the evening that she must leave the next morning, the fact that when the notice was given she said that she did not have to go, or would not go, would not justify defendant in ejecting her forthwith. She would still be entitled to leave. The remainder of this paragraph of the charge instructed the jury that if defendant acted under the belief that he had a right to eject plaintiff, that fact might be considered in mitigation of his acts, even if they were unlawful. Appellant complains of this on the ground that it was erroneous and misleading, in that it asserted that the facts could be considered in mitigation only, whereas they should have the effect to eliminate the element of malice and claim for exemplary damages. But other portions of the charge presented this question to the jury. The charge was correct, so far as given. If further instructions were needed, they should have been asked.

7. —— : mitigation of damages : belief of defendant.

VI. Appellant complains of various rulings of the court in admitting and excluding evidence, and of different portions of the charge. We have considered all the questions discussed, and have made special mention of the most important of them. We discover no prejudicial error in any.

VII. The appellant insists, finally, that the verdict and special findings were excessive, and not warranted by the evidence. The jury found that plaintiff was entitled to recover sixteen hundred dollars, of which six hundred dollars was for actual, and the remainder for exemplary, damages. If the evidence given on the part of plaintiff is credible, the acts of defendant in ejecting plaintiff

8. —— : ejection of woman from house at night and in bad weather: excessive verdict.

were without any reasonable cause or justification. She was assaulted and beaten while in a delicate state of health, and driven out of the house in the evening in inclement weather, and compelled to seek shelter at the house of a neighbor. She testifies to serious injuries, and is corroborated to some extent by the testimony of others. The injuries for which she may recover, under the allegations of her petition and the evidence, are of such a character that the money compensation therefor cannot be ascertained with exactness, but must be determined by the jury in the exercise of a sound judgment, guided by the instructions of the court. *Russ v. War Eagle*, 14 Iowa, 372; *Locke v. Sioux City & P. Ry. Co.*, 46 Iowa, 115. We cannot say that the verdict is against the weight of the evidence. The judgment of the district court is AFFIRMED.

HERRICK v. TALLMAN *et al.*

Mortgages: SALE UNDER JUNIOR MORTGAGE: PURCHASE BY MORTGAGEE: AMOUNT BID. When a junior mortgagee buys in the premises under a foreclosure of his mortgage for less than the amount of his judgment, the unsatisfied portion of the judgment ceases to be a lien on the property, but he is not bound to see that the property sells for enough to satisfy the prior liens; and he may afterwards take an assignment of the senior mortgage and foreclose it, and sell the land thereunder.

Appeal from Jones District Court.—HON. JAS. D. GIFFEN, Judge.

FILED, OCTOBER 10, 1888.

ACTION in equity. Judgment for the defendants, and the plaintiff appeals.

J. W. Jamison, for appellant.

Remley & Ercanbrack, for appellees.

SEEVERS, C. J.—The plaintiff is the owner of certain real estate described in the petition. She obtained the title thereto from John A. White, subject to certain mortgages thereon. The prior mortgage was given to E. M. Condit; the second, given to secure several promissory

notes. The note first due, secured by this mortgage, was assigned to and became the property of Emma Newman. The remaining notes were assigned to and became the property of John Merritt, who died after the commencement of this action, and the executors of his estate were substituted as defendants. In December, 1884, Merritt foreclosed the mortgage as to the notes owned by him. In February, 1885, Emma Newman foreclosed the same mortgage to the extent of her interest thereunder, and her lien was decreed to be superior to the lien of Merritt. At the same time Condit foreclosed his mortgage, and his lien thereunder was decreed to be superior to the lien of both Newman and Merritt. On the twenty-seventh day of March, 1885, Merritt caused the mortgaged premises to be sold under a special execution issued in pursuance of his judgment of foreclosure, and purchased the premises at less than the amount of his judgment. The plaintiff insists that Merritt, at that time, owned both of the prior liens in favor of Condit and Newman; and an assignment thereof was made on the records to him, and is dated the twenty-sixth day of March, 1885; but it satisfactorily appears from the evidence that such date is a mistake, and that in fact he did not become the owner of the prior liens until the twenty-seventh day of March, and after he had purchased the premises at sheriff's sale. Within one year from such sale the plaintiff paid the clerk the amount bid by Merritt at the sale to him, with interest; and claims that by so doing she effectuated a valid redemption of the premises from such sale. Afterwards, Merritt caused an execution to issue on the Newman foreclosure, and thereunder purchased the premises at sheriff's sale, for the amount due on it and the Condit foreclosure.

The plaintiff claims that the sale of the whole of the mortgaged premises under the Merritt foreclosure exhausted the lien of the mortgage, and thereby, in legal effect, the Newman judgment and foreclosure were satisfied. In other words, the plaintiff claims that Merritt was bound to bid all he deemed the premises were worth,

or all he was willing to give; and, if he failed to do this, he could not afterwards procure an assignment of the Newman judgment, and again sell the premises thereunder. The relief asked is that the sale under the Newman foreclosure be set aside, and the defendants, by a proper decree, be forever barred from claiming any right to the premises under the Newman foreclosure. In support of this claim, appellant's counsel cites and relies on *Poweshiek County v. Dennison*, 36 Iowa, 244; *Clayton v. Ellis*, 50 Iowa, 590; *Escher v. Simmons*, 54 Iowa, 269; *Harms v. Palmer*, 61 Iowa, 483, and 73 Iowa, 446.

Counsel for appellees concede that a valid redemption was effected from the sale under the Merritt foreclosure, and that, after the sale, the amount due on Merritt's judgment, not satisfied by the sale, ceased to be a lien on the mortgaged premises; and they insist that this is as far as the cited cases go; and this, we think, is substantially correct. The question in this case is different. Here the sale was under the junior foreclosure and lien, and the amount bid could not have the effect to satisfy a prior lien. Merritt purchased subject to the prior liens, and to obtain title he was bound to pay them off. Merritt was not bound to see that the premises sold for an amount sufficient to satisfy prior liens. Nor was Emma Newman bound to take notice of the sale and bid when the premises were offered for sale, under the Merritt foreclosure, in order to protect her rights. We have no occasion to determine what would have been the effect if Merritt had owned both the junior and superior liens at the time he purchased the premises under the former. AFFIRMED.

ESLICH V. THE MASON CITY & FORT DODGE RAILWAY COMPANY.

1. **Pleading: AMENDMENT: DISCRETION OF COURT.** It is within the discretion of the court to allow a material amendment to be made in the pleadings at any time. (Code, sec. 2689).

2. ——— : AMENDMENT TO PETITION : ADMISSION BY FAILURE TO ANSWER. An amendment to a petition setting up a material fact, which is not denied by answer, is regarded as admitted. (Code, sec. 2712).

3. **Evidence** : SECONDARY : ON POINT NOT IN ISSUE. The admission of secondary evidence to prove an allegation of the petition which is not denied, and therefore is admitted, cannot prejudice defendant.

4. **Railroad on Street** : INJURY TO ABUTTING PROPERTY : EVIDENCE : CONDITION OF TRACK. In an action by the owner of property abutting on a street, for damages on account of a railroad built along the street, witnesses who gave their opinion as to the depreciation of the value of the property on account of the building of the road were allowed to state that the road was so built and maintained that the tops of the rails were from eight to twelve inches above the surface of the street, which was at or near the established grade. *Held* that this testimony was competent for the purpose of showing one of the facts on which the witnesses based their opinion.

5. ——— : ——— : DAMAGES : ESTOPPEL. Where defendant built its road along the street of a town under an ordinance requiring it to conform its track to the established grade, and it construed the ordinance as authorizing it to so construct its road that the ties should rest on the surface of the grade, and thus throw the rails wholly above the surface, and built and maintained its road in that way, *held* that it was estopped from claiming, in an action for damages by an abutting lot-owner, that it might be compelled under the ordinance to reduce its rails to the surface of the grade, and that therefore the plaintiff's damages ought not to be estimated upon the present condition of the road.

6. ——— : ——— : EVIDENCE : FACTS ON WHICH OPINIONS OF WITNESSES ARE GROUNDED. One of defendant's witnesses, who was an insurance agent, gave his opinion as to the depreciation of plaintiff's property on account of the building of defendant's railroad along the adjacent street. On cross-examination he was permitted to testify that the annual premium for the insurance of the property would be two and one-half per cent. higher, and that he had not taken this into account in forming his opinion, but formed it upon the assumption that if the property was burned by fire set out by the road the defendant would be absolutely liable for the loss. *Held* that this evidence was properly admitted for the purpose of showing on what the witness had based his opinion.

Appeal from Webster District Court.—HON. S. M. WEAVER, Judge.

FILED, OCTOBER 10, 1888.

PLAINTIFFS own a tract of land in Lehigh, on which is situated a two-story building. The lower story is

used for business purposes, and the second story as a residence. Defendant constructed its railway in the street upon which the property abuts, and this action was brought for the recovery of damages for the injury to the property occasioned thereby. There was a verdict and judgment for plaintiffs. Defendant appeals.

A. N. Botsford, for appellant.

Chase & Chase, for appellees.

REED, J.—I. It was not alleged in the original petition that Lehigh is incorporated. During the progress of the trial plaintiff was permitted, over defendant's objection, to file an amendment alleging that the town is incorporated. No answer was filed to that amendment, and the court instructed that the incorporation of the town was admitted. These rulings are assigned as error. The statute under which the action was brought (Code, sec. 464) affords a remedy to a property-owner for the injury to his property caused by the construction of a railway in the street on which it abuts, only when it is situated in an incorporated town or city. The allegation that the town was incorporated was therefore "material to the case," and, under section 2689, it was within the discretion of the court to permit it to be made by amendment at any time. The allegation was not denied by any pleading filed subsequent to the amendment. It is true, the answer to the original petition contains a general denial of all the allegations therein contained. But that did not put in issue the allegations of additional facts contained in the amendment subsequently filed. "Every material allegation in a pleading not controverted by a subsequent pleading shall, for the purposes of the action, be deemed true." Code, sec. 2712. The court, against defendant's objection, admitted parol evidence tending to prove that the town is incorporated. But, as

1. PLEADING: amendment: discretion of court.

2. ——: amendment to petition: admission by failure to answer.

3. EVIDENCE: secondary: on point not in issue.

that fact was not in issue, no prejudice resulted from the admission of the evidence, conceding that it is incompetent.

II. Witnesses who gave their opinion as to the extent to which the value of the property was depreciated by the construction of the track in the street were permitted, against defendant's objection, to describe the condition in which it had been maintained. Their testimony tended to prove that, as constructed and maintained, the tops of the rails were from eight to ten or twelve inches above the natural surface of the street, which was shown to be at about the established grade. By the ordinance granting to defendant the right to use the street, it is required to conform its track to the established grade. The objection urged against the evidence is that defendant, if its track, as constructed and maintained, is an unreasonable obstruction of the street, may be compelled to change it; and that plaintiff is therefore not entitled to recover on the theory that it will always be maintained in its present condition. The evidence was not offered, however, for the purpose of establishing a substantive item of damage. The condition of the track was given simply as one of the facts taken into account by the witnesses in forming their opinion as to the extent of the depreciation in the value of the property. And for that purpose the evidence was competent. In determining defendant's rights under the ordinance, the question would arise whether it was required to conform the top of the track to the grade, or whether it was permitted to place the ties upon the surface of the grade, and thus throw the rails wholly above that surface. When it came to exercise the privilege conferred, it placed this latter construction upon the ordinance. It asserted, in effect, that the ordinance conferred upon it the right to so construct its track that the ties would rest on the surface of the grade, and it continues to act upon the theory that that is the proper construction. It will not be permitted, while making

4. RAILROAD on street: injury to abutting property: evidence: condition of track.

5. —: —: damages: estoppel.

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8. —: —: evidence: facts on which opinions of witnesses are grounded.

value of his opinion, as evidence, would thereby be impaired. Now, while plaintiffs were not entitled to recover the increased cost of insurance on the property, and did not seek to recover therefor as an item of damage, it is plain that the market value of the property might be materially lessened by reason of it. Prudent business men, as a rule, insure their property; and property which, owing to its location or surroundings, is not insurable, is necessarily of less value than it would be if insurable, and the cost of insurance is a matter which always affects its value. The facts elicited by the cross-examination, then, were competent for the purpose for which they were elicited, viz., for testing the value of the opinion expressed by the witness in his examination in chief. We find no error in the record, and the judgment will be AFFIRMED.

EVANS V. ATKINS.

Mortgage: FORECLOSURE: JUNIOR MORTGAGEE NOT MADE PARTY: SUBSEQUENT FORECLOSURE AS TO HIM: DECREE: REDEMPTION. The holder of a senior mortgage foreclosed and bought in the land, but failed to make the junior mortgagee a party. Subsequently, he brought an action against the junior mortgagee to foreclose his equity of redemption, and a decree was entered, upon a default, for the relief sought, without allowing any time within which redemption might be made. *Held* that, if this was error, it did not avoid the decree; and that, so long as it stood uncorrected, the junior mortgagee could not redeem the land.

Appeal from Plymouth District Court.—HON. SCOTT M. LADD, Judge.

FILED, OCTOBER 10, 1888.

ACTION to redeem from a mortgage. The defendant demurred to plaintiff's petition. The demurrer was overruled, and, plaintiff standing thereon, a decree was entered dismissing his petition.

Frank Amos and *J. W. Bull*, for appellant.

Struble, Rischel & Hart, for appellee.

BECK, J.—I. One Hewitt executed a mortgage upon certain lands to Langdon, which was foreclosed in a proper action, and the lands were sold on the decree to Langdon, and a deed for them was executed to him. He subsequently conveyed the lands, and his grantee conveyed them to defendant. Defendant and his grantees have occupied the lands for a number of years under the title based upon the foreclosure and sale thereunder. Plaintiff held a junior mortgage on the same lands covered by the mortgage foreclosed. He was not made a party to the foreclosure proceedings. He brings this action to redeem from the foreclosure, and claims that the rents and profits of the lands should be determined, and the amount thereof applied to the mortgage debt of Langdon, which would thereby be fully paid and discharged. Defendant, for answer, among other things, alleges and shows that, after Langdon had acquired title to the lands under foreclosure sale, he instituted an action seeking to cut off and foreclose plaintiff's equity of redemption under the mortgage. Plaintiff was made a defendant to the action, and was personally served with notice, but, failing to appear, a decree upon his default was rendered against him, in effect granting the relief prayed for. To this answer plaintiff demurred. The demurrer being overruled, and plaintiff refusing to further plead, a decree was rendered dismissing his petition.

II. The decree of foreclosure in the action brought by Langdon did not cut off the right of plaintiff, as a junior incumbrancer, to redeem. He still held that right after the decree and sale; but it was a right to subject the land to his mortgage upon paying the senior mortgagee the amount of his mortgage debt. This right is supported upon no other foundation than payment of Langdon's mortgage debt. This he is authorized to do at any time within the period prescribed by the statute of limitations. But the law authorizes Langdon to call upon him to exercise his right, and in case of his failure

to do so it will be cut off—foreclosed—by a decree so providing. The plaintiff has no title or interest in the lands before redemption. See *Shaw v. Heisey*, 48 Iowa, 468. The answer of defendant shows that Langdon, in the action brought by him against plaintiff, did call upon him to redeem, which he failed to do. Thereupon a decree was entered cutting off plaintiff's equity of redemption.

III. In our opinion the decree sufficiently provides for this remedy. Plaintiff's counsel think it fails to do so. While the decree is not clothed in the plainest language, and is drawn with little skill, we think it expresses with sufficient clearness the thought that plaintiff's equity is foreclosed. It does not provide within what time plaintiff may redeem. It may be that such a provision would be proper, or, indeed, demanded, to the end that equity be fully done. Yet it cannot be held that an omission to provide for the time of redemption renders the decree void. The court surely had jurisdiction of the parties and subject-matter involved in the action. If it erred in exercising this jurisdiction, its decree is not void, but will stand until this error is corrected. Counsel think the Langdon suit, and the decree thereon, operated as a strict foreclosure, and therefore time ought to have been extended for redemption. It may be assumed, for the purpose of the case, that counsel's position is correct, yet the error complained of does not go to the jurisdiction of the court, and does not invalidate the decree. Plaintiff, if prejudiced by the error, ought to have pursued the course pointed out by the law to correct it. It is our opinion that the decree of the district court ought to be

AFFIRMED

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Booth v. Gish *et al.*

1. **Garnishment:** OF PERSONS IN POSSESSION OF DEBTOR'S MORTGAGED CHATTELS: CHATTELS TAKEN ON MORTGAGE: LIABILITY. Where persons who were in the possession of the debtor's mortgaged chattels, as his agent, were attached as garnishees, and the property was taken from them by the mortgagees by virtue of the mortgages, they were properly discharged from liability. (See opinion for citations).

2. ——— : ——— : NO LIEN CREATED. In such case the garnishment created no lien on the property or its proceeds, and did not affect the rights of a second mortgagee whose mortgage was made subsequent to the garnishment.

3. ——— : ——— : SALE ON FORECLOSURE : SURPLUS. In such case, as the first mortgagee was not garnished, the surplus remaining in his hands, after satisfying his claim, was not reached by the process, but was subject to garnishment by another creditor.

Appeal from Shelby District Court.—HON. A. B. THORNELL, Judge.

FILED, OCTOBER 10, 1888.

ON the eighth day of May, 1886, plaintiff commenced an action at law against Charles O. Gish and Harvey L. Gish, and on the eleventh day of the next August recovered judgment therein against both of said defendants for $211.53, and costs. The action was aided by an attachment against the property of Harvey, which was served by garnishing Francis M. Gish and John S. Gish on the day the action was commenced. The answers of the garnishees were taken, showing that when the process of garnishment was served they had charge of certain cattle, horses and other personal property which belonged to Harvey; that at that time it was all under mortgages executed by Harvey to one John T. Jack, and that a few days afterwards Harvey executed a third mortgage on the property in favor of one Fluke; that all this property was taken from them on the second of

August, 1886, by virtue of the Jack mortgages. After these answers were taken the plaintiff filed a petition in equity, in which he alleged that he was entitled to a lien on so much of the mortgaged property and its proceeds as remained after the payment of the Jack mortgages; that the property had been sold by Jack, and that the proceeds were retained by him, and asking that he be required to account for the proceeds of the sale, and that plaintiff have judgment against him for the amount due on the judgment against Charles O. and Harvey L. Gish. Jack and Macy & Gammon were made parties to the equitable proceeding, and filed answers. The S. N. Bowman Lumber Company intervened, claiming an interest in the proceeds of the property, and making Jack and Fluke parties defendant. The case was tried to the court, and a decree rendered dismissing plaintiff's petition, discharging the garnishees Francis M. and John S. Gish, and giving the intervenor judgment against Jack for twenty-one dollars. The plaintiff appeals.

Smith & Cullison, for appellant.

Macy & Gammon, for themselves, and *John T. Jack* and *D. O. Stuart*, for intervenor.

ROBINSON, J.—It is shown that all the property in controversy was sold to satisfy the Jack and Fluke mortgages, for the sum of $1,621.40; that the costs of the sale were $144.20; that there was due to Jack on his mortgages the sum of $805.52; and that the surplus of $671.68 was turned over to Macy & Gammon on account of the Fluke mortgage. The intervenor holds a judgment for $137.37 against Harvey L. Gish. This was rendered on the twentieth of February, 1886. An execution was issued thereon, and on the second day of August, 1886, it was served by garnishing Jack, Fluke and George S. Rainbow, sheriff, as the agent of Jack in foreclosing his mortgages. The validity of Jack's mortgages is not questioned. Jack admits a balance of twenty dollars remaining in his hands from the sale,

decisions of this court hold that no lien on property of the kind in controversy can be acquired by process of garnishment. *McConnell v. Denham*, 72 Iowa, 494; *Mooar v. Walker*, 46 Iowa, 166. By this process the attaching creditor "does not acquire a clear and full lien upon the specific property in the garnishee's possession, but only such a lien as gives him the right to hold the garnishee personally liable for it, or its value." Drake, Attachm., sec. 453; *Mooar v. Walker*, *supra*. Of course, the garnishee cannot be held for the value of the property where he had no right to hold the property itself, as in this case. It is not claimed that chapter 117, Acts Twenty-first General Assembly, has any application to this case. We conclude that the garnishees were properly discharged. They were under no obligation to pursue the property after it had been taken from them by due authority.

II. Appellant next urges that by his process of garnishment he acquired a lien upon the property which remained after the payment of Jack's claims, which should be enforced against Macy & Gammon, as holders of the surplus. Much of what we have already said is applicable to this claim. Since no lien was created on the property, its owner had a right to mortgage it, and Macy & Gammon are entitled to hold the proceeds in their hands for the satisfaction of the claims which the Fluke mortgage secured.

2. —: —: no lien created.

III. It is next urged that judgment should have been rendered in favor of plaintiff, and against Jack. But Jack was not garnished by plaintiff, and, since the property which he took was subject to no lien in favor of plaintiff, the surplus which he held was subject to the garnishment of the intervenor. The decree of the court below is

3. —: —: sale on foreclosure: surplus.

AFFIRMED.

SCHOBER v. ROSENFIELD.

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loating Liquors: ILLEGAL SALE BY AGENT: LIABILITY IN TO RECOVER PURCHASE PRICE. An agent who sells intoxi- liquors in violation of law, but who does not receive the se money, is not liable, under section 1550 of the Code, in on by the purchaser to recover the purchase money. Sec- 40 of the Code does not have the effect to make him liable.

: ILLEGAL SALE: RECOVERY OF PURCHASE PRICE: DEMAND. ion cannot be maintained, under section 1550 of the Code, to the purchase price of intoxicating liquors unlawfully sold, t first making demand for the repayment of the money.

rom Montgomery District Court.—HON. A. B. THORNELL, Judge.

FILED, OCTOBER 11, 1888.

ON to recover the amount of payments alleged been made for intoxicating liquors sold in of law. There was a trial to a jury, and a ver- l judgment for plaintiff. The defendant J. d appeals.

. Richards, S. McPherson and *W. S. Strawn*, llant.

INSON, J.—The plaintiff alleges that during the of February, March and April, 1887, he pur- f defendants, L. & J. Rosenfield, intoxicating for which he paid in the aggregate $98.60; and liquors were sold in violation of the laws of he court directed a verdict in favor of L. Rosen- he amount of the verdict and judgment against field was $98.60. Two questions of law are cer- this court for determination.

The first question is as follows: "Is an agent s intoxicating liquors to the purchaser, but

1. Intoxicating liquors: illegal sale by agent: liability in action to recover purchase price.

which agent does not receive the money or purchase price, liable, at the suit of said purchaser, for the purchase price of said liquors?" This action is brought under that portion of section 1550 of the Code which reads as follows: "All payments or compensations for intoxicating liquor sold in violation of this chapter, whether such payments or compensation be in money, goods, land, labor, or anything else whatsoever, shall be held to have been received in violation of law, and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver, in consideration of the receipt thereof, to pay, on demand, to the person furnishing such consideration the amount of said money, or the just value of such goods, land, labor, or other thing." It will be noticed that the consideration of the promise to repay is the receipt of the money or other thing given for the liquors, and the one who receives it is the one who is liable, by the terms of the statute, to repay it or its value. Section 1540 of the Code provides that agents who violate the provisions of law relating to intoxicating liquors "shall be charged and convicted in the same manner as principals may be, and shall be subject to the penalties herein provided." But this refers to punishment for violation of the law. Section 1550 is designed to enable the purchaser of liquors illegally sold to recover the amount of money, or the value of property or other thing, paid by him, and gives a right of action therefor against the one who receives it. It was, no doubt, in part designed to discourage illegal sales; but the punishment of the seller was not its primary object. That is provided for elsewhere. Whether an agent who actually receives the consideration for the illegal sale would be liable in an action of this kind we need not determine. He certainly is not liable unless he does receive it.

II. The second question certified is as follows: "Can a suit be brought for the purchase price of liquors

2. ——: illegal sale: recovery of purchase price: demand.

unlawfully sold, without first making a demand for the money thus paid for the liquors by the plaintiff, and is the bringing of the suit a sufficient demand." The law provides that the consideration paid for intoxicating liquors sold in violation of law shall be held "to have been received upon a valid promise and agreement of the receiver, in consideration of the receipt thereof, to pay, on demand, to the person furnishing such consideration," its amount or value. He is to pay it, not because the sale was illegal, although that is a condition of his liability, but because of a valid agreement so to do, made by operation of law as a result of the illegal sale and receipt of the consideration. By the terms of this agreement the obligor is required to make payment on demand, but not before. A demand is necessary to fix his liability. It was not fixed by the illegal sale, nor by the lapse of time. We therefore conclude that the rules governing ordinary agreements for the payment of money on demand should govern in this case. The judgment of the district court is

REVERSED.

SCHMIDT V. KISER *et al.*

Practice: MOTION TO PRODUCE BOOKS OF ACCOUNT: DISCRETION OF COURT. A motion to compel the plaintiff to produce his books of account for the purpose of being inspected and copied was made on the morning of the day set for the hearing of the case. The plaintiff resided and did business in Chicago, and the issues in the case had been made up, and the case set down for hearing on depositions, six months previous to the motion. *Held* that the court did not, in overruling the motion, abuse the discretion vested in it by the statute. (See Code, secs. 3685, 3686, and *Allison v. Vaughn*, 40 Iowa, 421).

Appeal from Lee District Court.—HON. J. M. CASEY, Judge.

FILED, OCTOBER 11, 1888.

ACTION to foreclose a mortgage on real estate. The defendants pleaded that the note secured by the mortgage was executed in settlement of losses and differences in the purchase and sale of pork on the board of trade in Chicago; that it was never contemplated that the pork would be delivered, but the purchase or sale thereof was a mere wager or gambling contract, and therefore there was no legal consideration for the note. Trial to the court, judgment for the plaintiff and defendants appeal.

Craig, McCrary & Craig and *Jas. H. Anderson*, for appellants.

Anderson & Davis, for appellee.

SEEVERS, C. J.—The question to be determined is one of fact, and we think appellants have failed to establish by a preponderance of the evidence the essential proposition upon which the defense is based. There is but little evidence in the record, except that of the defendant Kiser and the plaintiff. There are also some letters from one to the other. The evidence of Kiser tends, it can possibly be said, to show that the mortgage was given in settlement of differences on a gambling contract. That of the plaintiff tends to show otherwise. We have carefully examined the evidence, and have scrutinized it closely, for the purpose of determining the rights of the parties; and our conclusion is that defendants have failed to establish that the mortgage was given in settlement of differences that arose out of a gambling contract. It would serve no good purpose to set out the evidence, nor is it necessary to discuss it. In fact, this could not be done without setting it out at some length. The defendants insist that the burden is on the plaintiff to establish that the mortgage was given in settlement of some valid transaction. Thus broadly stated, the proposition cannot be sustained; but there are cases which hold that, where

suspicion has been cast on the transactions between the parties, then the burden is on the plaintiff to show that the property bought or sold was to be actually delivered. *Barnard v. Blackhaus*, 52 Wis. 593. Conceding this to be the rule, we are unable to say, upon the whole evidence, that the plaintiff is not entitled to the relief granted by the district court.

The issues were settled in March, 1887, and the case was set down for hearing on depositions. The hearing was had on the second day of November, 1887. On the morning of that day the defendant filed a motion for an order requiring the plaintiff to produce his books of account from April, 1883, to September of the same year, for the purpose of being inspected and copied. This motion was overruled. It is insisted that the court erred in so ruling, and, in support of this position, sections 3685 and 3686 of the Code are cited. The statute, in terms, places this matter within the discretion of the court, and we are unable to see that such discretion has been abused. It appears from the record that the plaintiff resides and does business in Chicago. The court may have, as in *Allison v. Vaughan*, 40 Iowa, 121, refused the rule because of the delay in asking for it. The cited case and this are singularly alike.

AFFIRMED.

PATTEN v. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

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Railroads: FENCING TRACK AGAINST STOCK: SNOW-DRIFTS OVER FENCES. It is not negligence for railway companies to allow snow-drifts to remain over their fences, so that they do not serve the purpose of restraining stock from crossing over them into their right of way.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, OCTOBER 11, 1888

ACTION to recover double the value of a colt owned by plaintiff which was killed by a train on defendant's road at a place where it had the right to fence its track. There was a judgment on a verdict for plaintiff. Defendant appeals.

Taylor, Healy & Sherman and *Marks & Mould*, for appellant.

Brennan & Sullivan, for appellee.

BECK, J.—I. There was evidence tending to prove that the colt, to recover the double value of which the action is brought, went upon the track of the railroad by crossing the fence built by defendant, upon the snow, which was of such depth or was so drifted as to be nearly as high as the fence. The district court directed the jury that, "if the fence was sufficient as originally constructed, and became temporarily defective by reason of the snow drifted against the fence, then the company would not be liable until a sufficient time thereafter had elapsed for the company to have discovered the defect, and remedy the same before the injury," and refused an instruction in this language: "1. The law does not require railway companies to keep their fences along their right of way clear of snow-drifts, nor to build, keep and maintain such fences at any specified height above the height of the top of such snow-drifts; nor is it negligence on the part of railway companies to allow snow-drifts to remain drifted over their fences so that they do not serve the purposes of restraining stock from crossing over them into their right of way."

II. In these rulings, or instructions, the district court held that the defendant was liable as for the absence of a fence along its track, or the insufficiency thereof, when the snow was drifted or fell to such a depth that cattle could cross over the fence on the snow, after sufficient time had elapsed to enable defendant to discover such snow and snow-drifts, and provide a remedy for the exposure of the railroad thereby. The

district court regarded the snow and snow-drifts as defects in the fence, and that unlawful delay or neglect in remedying them would render defendant liable as for failure to maintain a sufficent fence. We are of the opinion that these views of the question are incorrect.

III. The defendant is charged with the duty of erecting fences, or, rather, is liable for double damages in cases of this character, if it omits to erect fences. But its duty and liability is recognized by the law to the end that live stock may be kept from its track. It is required to do no more than to erect such fences as under ordinary circumstances will secure the protection intended. It is not required to build fences which will resist the power of the elements, or are so high that the snows of our winters will never cover them. Fences of the character and height required by the statute for the control of live stock ought to be constructed by the railroads. It would be unreasonable to require them to build fences of a different character. Nor can the railroads be required to do that which the farmers never attempt, namely, to remove the snow and drifts from their fences. Other questions in the case need not be discussed, as the judgment, for the errors pointed out, must be

REVERSED.

BOCK v. THE ANCIENT ORDER OF UNITED WORKMEN *et al.*

Life Insurance: ANCIENT ORDER OF UNITED WORKMEN: ADHERENCE TO BOTH LOYAL AND DISLOYAL LODGES: DOUBLE PAYMENT ON ONE CERTIFICATE. Prior to the schism in the Ancient Order of United Workmen in Iowa, plaintiff's husband was a member of Schiller Lodge, in that order, at Clinton, Iowa, and he continued to be a member of said lodge in good standing up to the time of the controversy between the Supreme Lodge of the United States and the Grand lodge of Iowa. He never withdrew from Schiller Lodge, but continued to pay his dues and assessments to that lodge until the time of his death, and upon his death plaintiff presented his claim to said lodge for payment, and it was paid in full, and her husband's certificate of membership was surrendered to that lodge, fully receipted. After said schism, however, plaintiff's husband adhered to what was known as the loyal grand lodge of Iowa, and assisted in organizing, and became a member of, Loyal Lodge, No. 237, at Clinton. The loyal lodge, so called, did not issue new certificates to such of their members as were in good standing in the disloyal lodge prior to the disruption, because it claimed to be the only legitimate lodge, and that the members in good standing before the disruption were *ipso facto* members in good standing in the loyal lodge, and that the certificates of membership already issued were certificates of membership in the only lodge known to the law. Plaintiff's husband paid his dues and assessments in the loyal lodge, also, up to the time of his death, and the loyal Grand Lodge of Iowa made and collected an assessment to pay the amount named in the certificate, but it refused to pay the same because plaintiff could not surrender the certificate, receipted, as required by the rules of the organization. Plaintiff's husband knew that the loyal lodge did not issue new certificates, and that he was, on account of his age, at the time of the organization of Loyal Lodge, No. 237, ineligible to membership as a new member. *Held* that plaintiff's husband had but one contract of insurance, and that she could not collect the amount thereof of the loyal lodge, after having surrendered the certificate to the disloyal lodge upon payment from it.

Appeal from Clinton District Court.—HON. W. F. BRANNAN, Judge.

FILED, OCTOBER 11, 1888.

continued to act independently of the supreme lodge. A minority refused to unite with the others, and the consequence was there were two organizations, each claiming to be the regular and legitimate Grand Lodge of Iowa. Each organization recognized the former members of the order as legitimate members of their respective bodies. Henry Bock, the plaintiff's deceased husband, and others, organized a new subordinate lodge at Clinton, called the Loyal Lodge No. 237, under the jurisdiction of the defendant grand lodge. He was then past the age of eligibility to original membership in the order. But each of the rival state organizations claimed that all of the individual members in good standing at the time of the schism were legally members of their respective state organizations, and when Bock went into the new subordinate lodge no beneficiary certificate was issued to him. The defendant grand lodge refused to issue new certificates, because the members had certificates issued to them before the disruption; and it is evident that the refusal to issue new certificates was upon the ground that such act would be in the nature of an acknowledgment of the legitimacy of the rival state grand lodge. In fact, the defendant grand lodge has always claimed that it has rightful jurisdiction over all the subordinate lodges, and that there is no other A. O. U. W. in Iowa excepting such as acknowledge allegiance to that organization which claims to be loyal to the Supreme Lodge of the United States. Bock did not withdraw from Schiller Lodge when he became a member of Loyal Lodge No. 237. He paid his dues in the new lodge until his death, amounting to about twenty dollars, and also paid all dues and assessments made by Schiller Lodge. After his death the plaintiff made the requisite proofs, and presented her claim to the body which refused to recognize the supreme lodge; and this organization, which in the record is denominated the disloyal lodge, paid to her the full sum of two thousand dollars, and she delivered her beneficiary certificate to that organization, fully receipted. A claim was also made against the loyal grand lodge, defendant. An assessment was

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it was unpaid, she would have been entitled to the payment of two thousand dollars from the defendant upon surrendering it and receipting it. The defendant never denied liability upon the certificate. It refused to issue a new one, and it had no power to do so, because the plaintiff's husband was not eligible to additional insurance. And the defendant is not liable upon the ground of estoppel, simply because the deceased must have known that he had but one contract of insurance, and that was for two thousand dollars. The plaintiff acquired no right to the money because an assessment was made by the defendant. It must be made to appear that it is held by the officers in trust for her. It does not appear that the defendants made any valid contract to pay her the sum claimed, except as embodied in the certificate, which we have found has been fully paid.

AFFIRMED.

CLEVELAND v. STILWELL *et al.*

1. **Assault and Battery**: EVIDENCE AGAINST ABETTOR. In a civil action against a father and son for an assault and battery, though the evidence failed to show that the father took an actual part in the assault, it did show that, before it was ended, he in an angry and excited manner expressed his interest on the side of his son, and a readiness to take a part in the trouble. *Held* that this was sufficient to justify a verdict against him as an abettor.

2. ——— : ———. In such case, evidence of the acts and declarations of the father during the fight was competent to show his spirit and purpose in encouraging his son in the matter.

3. ——— : TWO DEFENDANTS : INSTRUCTIONS. In such case, an objection to an instruction because it does not discriminate between the liability of the father and son is not well taken, where such discrimination is made in other instructions.

4. ——— : PUNITIVE DAMAGES : INSTRUCTION. In such case, an instruction from which the jury might be warranted in finding punitive damages is no ground for complaint where it appears from the verdict that no such damages were found.

Appeal from Marion District Court.—HON. J. K. JOHNSON, Judge.

FILED, OCTOBER 12, 1888.

ACTION to recover damages sustained by plaintiff rom injuries inflicted upon him by an assault and battery of the defendants. There was a judgment upon a erdict against both defendants. John Stilwell alone ppeals.

Hays Bros., for appellant.

Stone & Gamble, for appellee.

BECK, J.—I. The point mainly relied upon by ounsel to reverse the case, if we are to judge from the attention given thereto, is that the evidence fails to connect the appellant, John Stilwell, with the assault, and that there is such a ailure of proof to show that he aided or encouraged he other defendant, that the judgment ought to be set side on that ground. We think this position of counsel s not well taken. While the evidence fails to show that ppellant took a part in the assault, we think the jury vere authorized to find therefrom that he encouraged and betted the other defendant. The appellant is the ather of the other defendant, who engaged with plainiff; and before it had ended, and plaintiff had received he injuries of which he complains, the appellant was ertainly in an angry and excited manner demonstrating his interest on the side of his son, and, instead of ttempting to make peace, was expressing his readiness o take part in the trouble. The jury, we think, were uthorized to find that he aided or encouraged his son in is assault on plaintiff.

ASSAULT and battery: evidence against abettor.

II. A witness was permitted to testify as to the cts and declarations of appellant before the fight was over. The evidence, we think, was competent, as it tended to show the spirit or urpose of the appellant rather to encourage and timulate strife than to do the things which would have nade for peace.

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III. A witness was permitted to testify that when ppellant was informed that "there was damage done, he dropped his feathers pretty quick, and told Harvey [the other defendant] to put his

THE SAME.

coat on." The admission of the evidence is complained of. Its evident purpose is to show the appellant's spirit and disposition to encourage the fight, and that he did not change this disposition until he heard of the injury done to plaintiff. The reference to the injury sustained by plaintiff could not have been prejudicial to appellant. The fact that such injuries were sustained was properly shown to the jury by other evidence.

3. —: two defendants: instructions.

IV. It is insisted that an instruction is erroneous in that it does not "discriminate between the liability of appellant" and the other defendant. We think this was sufficiently done in other instructions, which directed the jury that, if they found that appellant aided, advised or encouraged "the fight, he is liable." The liability of the other defendant for the actual assault, if found, is correctly stated to the jury.

4. —: punitive damages: instructions.

V. Many objections to the instructions are made in the assignment of errors. All are not argued. We are of the opinion that the instructions fairly present the law to the jury. Counsel's objections to them are in many instances much in the nature of criticism. The jury were directed that, upon finding that the assault was unprovoked, and wantonly and maliciously made, they could allow punitive damages. It is claimed that there is no evidence showing the facts justifying punitive damages, and the instruction was therefore erroneously given. But we cannot say that there was no such evidence, and we think, as the verdict was for ninety dollars, and the evidence shows that plaintiff's jaw-bone was broken, the jury in fact allowed no punitive damages, for the actual damages surely equaled the amount found by the jury. No prejudice could have resulted to the defendant from the instruction complained of. We do not feel called on further to notice the instructions. In our opinion they are without error. Other matters in the case do not demand attention. The judgment of the district court is

AFFIRMED.

filing of the prior petitions it has been developed that the injuries sustained by plaintiff's wife were of a more serious character than was then supposed, and that she was permanently injured and disabled, and judgment was asked for fifteen hundred dollars. The court instructed the jury that the plaintiff was entitled to recover, if anything, such amount as will compensate him for the loss. The defendant moved for a new trial, on the ground that the verdict of the jury is for a greater amount than the claim presented to the board. The motion was overruled.

It is provided by the statute that "no action shall be brought against any county on an unliquidated demand, until the same has been presented to the board of supervisors, and payment demanded." Code, sec. 2610. No claim was ever presented to the board that the plaintiff had been permanently injured, and the claim presented was for five hundred dollars only. It would not have been sufficient if the plaintiff had presented a claim without stating how much he believed he was entitled to receive. Such amount must be stated, and the payment thereof refused, before an action can be maintained. If, after an action has been commenced, something occurs which the plaintiff believes entitles him to a larger amount, such claim must be presented to the board; but what would be the effect of such presentation we do not determine. It is the province of the board to determine whether a claim will be paid or litigated. If a claim had been presented for fifteen hundred dollars, the board might have concluded it was best to pay fifteen hundred dollars than litigate it; but, understanding that a recovery by action in court could not exceed five hundred dollars, the board may have thought better to refuse to pay it. The statute plainly says the claim must be presented to the board. What is a claim? It is a "demand made of a right or supposed right,—a calling on another for something due or supposed to be due, as a claim for wages or services,"—as defined by Webster. A claim for wages or services which failed to state the amount of money claimed would be a nullity

ed of him the key to the store. Hall
that a mortgage had been placed on the
used to surrender the key. Subsequently,
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were delivered to him to be recorded near
he close of business on one day, not to
nter them in the index until the next morn-
ng; but the court excluded the evidence,
d the jury that defendant was not charged
ctive notice of the mortgage until the
s thereof were made in the index. These
clearly right. The notice created by the
instrument is constructive. The implica-
mption that those dealing with reference to
affected by the instrument have notice of

ts as are shown by the record is raised by the and the whole subject is governed and limited by r section 1925, Code, it is the duty of the recorder, instrument of the character of that in ques- eposited with him to be recorded, to note thereon and hour of filing, and enter in the entry-book : the names of the mortgagor and mortgagee, the the instrument and the filing, and the nature nstrument; and the section also provides that e time of such entry the instrument shall be complete as to third persons. Under this pro- here can be no question as to the time when the ecomes notice to the world of the instrument. the prescribed entries are made, any person information with reference to the property, by ction of them, would learn of the existence of rtgage, and he is charged with notice of its e, whether he makes such examination or not. il they are made, the record, which is the source he is bound to go for information, is silent, and only instrument by which he can be charged constructive notice.

There is some conflict in the evidence as to Hall informed defendant, when the demand was made for the key, that plaintiffs were the parties to whom the mortgage had been given. It was undisputed, however, that he informed him that a mortgage on the stock executed. The district court instructed that dant was informed, before the levy was made, intiffs held a mortgage, or if he was then informed facts as would have put a reasonable man upon iry which would have led to the discovery that s held the mortgage, and the notice to surrender erty prescribed by the statute had been served m before the suit was instituted, plaintiffs would led to recover. The general verdict does not ily imply a finding in favor of defendant on f these questions. Neither are they determined pecial findings. The general verdict may have

been based upon a finding that the levy was complete before the information with reference to the mortgage was imparted to defendant. On that question the court gave the following instruction: "To constitute a good levy upon personal property, the officer must have such property within his dominion and control, and must, within a reasonable time, reduce the same to his actual possession. If you find that the defendant, having in his possession the writs in question, went to the store of Hall & Co. for the purpose of levying them upon the goods kept in said store, and, on attempting to enter, found the building locked, and thereupon, in pursuance of his intention to make such levy, placed a guard on the premises to maintain and protect his possession and dominion over the property, while he himself went for a key with which to effect an entrance, and within a reasonable time returned and unlocked or broke open the building, and took actual possession of the goods, such acts would constitute a good and sufficient levy from the time he first went upon the premises with intent to make the same."

In our opinion this instruction cannot be sustained It holds, in effect, that if defendant, when he placed the guard on the premises, intended to maintain possession and dominion over the property, and thereafter, within a reasonable time, effected an entrance and actual seizure of the goods, the levy is to be regarded as complete from the time he first attempted to enter the building. But whether a levy was accomplished depends upon the effect of what was done, rather than upon the intent with which it was done. To constitute a levy, the sheriff must, if the property is capable of manual delivery, take actual possession of it. Code, sec. 2967. He must do that which would amount to a change of possession, or which would be equivalent to a claim of dominion, coupled with a power to exercise it. *Crawford v. Newell*, 23 Iowa, 453; *Bickler v. Kendall*, 66 Iowa, 703. Now, while the act of placing the guard on the premises may have amounted to a claim of dominion over the property, it did not necessarily carry with it the power to exercise that dominion;

alone under the issue to which the instruction related. If so, the instruction was prejudicial. Now, while we will not reverse because of an erroneous ruling from which no prejudice could have resulted, the presumption, in the absence of anything in the record to the contrary, is that such ruling was prejudicial. And as it cannot be determined in the present case that the jury did not act under the instruction in question in finding their verdict, that presumption arises, and we must be governed by it.

III. In another instruction the court used the following language: "The delivery of the instrument to the recorder, and the stamping of the same as filed by such recorder, is not a record which will impart constructive notice; nor will any person be bound by the record, *or notice of such instrument, until the proper description thereof is entered in the entry-book or index-book*, as provided by law." Appellants, while denying the general doctrine of the instruction, a question which we have already considered, took special exception to that portion of it which we have italicized. Counsel contended that the jury might well have understood from that language that even actual notice to defendant of the mortgage would not bind him, unless the proper entry had been made in the index before the notice was given. It is very apparent, however, from the whole instruction, that the thought intended by the court is directly the opposite of that. Indeed, in another part of the instruction, the jury were told, in clear and express terms, that actual notice to defendant of the mortgage, before the levy, would bind him as effectually as the record would have done if it had then been made. While the particular language, then, standing alone, does not accurately or fully express the meaning of the court, it is very clear, we think, that the jury could not have been misled by it.

4. CHATTEL mortgage: filing for record: notice: instructions.

IV. It is contended that, as defendant did not pay or offer to pay the amount of the debt secured by the

ATTACHMENT: of goods under mortgage: validity: notice by mortgagee of his interest.

mortgage, as provided by chapter 117, Laws Twenty-first General Assembly, the levy is void; and hence it was not necessary to serve the notice of ownership prescribed by chapter 45, Laws 1884, before instituting the suit. Section 4 of the act provides, however, that nothing contained in the act shall in any way affect the right of the creditor to contest for any reason the validity of the mortgage. The creditors were contesting the validity of the mortgage on the grounds (1) that it was fraudulent; (2) that it had never been delivered; and (3) that they had no notice of it, which, if true, rendered it invalid as to them. The provisions of the act have no application when the mortgage is sought to be avoided on these grounds, and the requirement for notice is not affected by them. For the error pointed out the judgment will be

REVERSED.

THE ROCK ISLAND STOVE CO. v. WALROD *et al.*

Fraudulent Conveyance: GIFT TO DAUGHTER: SUBSEQUENT CREDITORS. Where a father, when solvent and out of debt, and with no intention of contracting debts, conveyed land as a gift to his daughter, *held* that subsequent creditors could not have the conveyance set aside and the land subjected to the payment of their claims.

Appeal from Shelby District Court.—HON. A. B. THORNELL, Judge.

FILED, OCTOBER 12, 1888.

THIS is an action in the nature of a creditor's bill, by which plaintiff seeks to set aside a transfer of one hundred and sixty acres of land made by the defendant Walrod to defendant Nellie Book, and subject said and to the payment of a judgment held by plaintiff against said Walrod. There was a decree for plaintiff, and defendant appeals

Smith & Cullison, for appellant.

No appearance for appellee.

ROTHROCK, J.—The debt upon which the judgment was founded was contracted in September, 1883. In the year 1882 the defendant Walrod was the holder of certain contracts of purchase of the land in controversy from the Chicago, Rock Island & Pacific Railroad Company. He had made certain payments on the same. He made the purchase intending to give the land to his daughter, Nellie Book. In pursuance of this purpose he advised his daughter and her husband that he intended to give the land to his said daughter. Harvey Book, the daughter's husband, went upon the land in the fall of 1882, and did some work in the way of building fence. The land had no building upon it, and was nearly all wild prairie. Early in the spring of 1883, Book built a house on the land, and took up his residence therein. He put up other buildings, and broke prairie, and continued to reside there for two years. He and his wife made payments on the contracts with the railroad company. On the thirteenth day of June, 1883, Walrod assigned said contracts to his daughter, and has never since assumed any control over the land. At the time he made the assignment of the contracts, Walrod was not in debt to any one, and was worth from six to eight thousand dollars. His son was engaged in the hardware business, and he formed a partnership with him in September, 1883. It appears that at that time the son was largely in debt, which fact the defendant did not know. The plaintiff sold to the partnership a bill of goods a short time after the defendant became a member of the firm. It does not appear that the defendant Walrod contemplated or thought of contracting any debts when he assigned the land contracts to his daughter.

The foregoing facts are undisputed. The decree for the plaintiff cannot be sustained. It is contrary to repeated decisions of this court. See *Whitescarver v. Bonney*, 9 Iowa, 480; *Fifield v. Gaston*, 12 Iowa, 218; and *Lyman v. Cessford*, 15 Iowa, 229.

REVERSED.

LYMAN V. LAUDERBAUGH.

nt: VOLUNTARY: TO RELEASE ATTACHME
TION. Defendant sued plaintiff in attach
wing all the facts in the case, voluntarily
for the purpose of releasing the attachm
(as he alleges in this action for the recover
ndant would repay the money if plaintiff
was not indebted to him when the attachi
t such promise of repayment was not wi
l that upon proof of it, and of the further f
we defendant at the time, plaintiff was en
the rule that a voluntary payment, with l
annot be recovered, unless made under co
, unjust and oppressive, did not apply.

——: ——: PROMISE TO REPAY: CO
e the agreement to repay the money did
a precedent to the commencement of the s
ntiff should satisfy defendant that he di
it when paid; but it was sufficient if he di
that fact was shown by the evidence in tl

——: RECOVERY: INSTRUCTION. In an a
aid to secure the release of an attachme
al promise to repay, the petition alleged
a payment was made was illegal and unj
r extortion was alleged in the petition, no
. *Held* that instructions from which the
at the payment was made under fraud
, were not warranted by the pleadings or t

de: ERRORS CURED BY VERDICT. Alleged
excluding evidence on a count of the pe
minal damages are found against defendan
sal on his appeal.

nent: WRONGFUL: ACTION ON BOND: AT
ection 2961 of the Code, where there is
nt bond for the wrongful suing out of the
s fee may be allowed the plaintiff, even th
nal damages.

rom Benton District Court.—
KINNE, Judge.

FILED, OCTOBER 12, 1888.

75—31

On the eighth day of December, 1886, H. K. Lauderbaugh, the defendant in this case, commenced an action against B. G. Lyman, the plaintiff herein, aided by attachment, to recover the sum of six hundred dollars. The petition alleged that the money was due for money and property wrongfully taken by Lyman, and converted to his own use, and that he was about to dispose of his property with intent to defraud his creditors. The writ of attachment was served by garnishing a bank in which Lyman had a deposit of thirteen hundred dollars or more. On the day the action was commenced Lyman paid to the plaintiff therein the sum of five hundred and twenty-six dollars, and the case was dismissed. A few days before this action was commenced Lyman demanded of the defendant herein repayment of said sum, which was refused. On the thirteenth day of January, 1887, the plaintiff filed his petition in this case, and subsequently filed an amendment thereto. The first count of the amended petition alleges the commencement of the aforesaid action against plaintiff, and the attachment proceedings thereunder; that all the money in the garnished bank was held under the garnishment, and placed beyond the reach of plaintiff; that plaintiff and his wife were at that time engaged in business in Vinton, and, by reason of said attachment, were unable to meet their engagements when they became due; that in order to release the attached property the plaintiff, under protest, and denying any indebtedness on his part, and under the express verbal promise of defendant to repay the same if the plaintiff could show that he was not indebted to him, paid to defendant the sum of five hundred and twenty-six dollars; that plaintiff paid said sum to emancipate his property from the said control imposed by defendant, and that he had no other means of immediate relief, except to advance said money as aforesaid. The said count further alleges that plaintiff did not owe defendant anything; that he had not converted the sum of six hundred dollars, or any other

it, belonging to defendant, to his own use; and was illegal and unjust; that defendant ɔted to plaintiff in the sum of five hundred ix dollars, with interest thereon from 886. The second count alleges the com- the attachment suit; the filing of a bond fifteen hundred dollars; the issuance and writ, and that the same was wrongfully, naliciously sued out, and without probable ment was asked on the bond. The answer tachment suit, the issuance and service of tachment, the payment of the money, and for its repayment. It alleges that the fully settled all matters involved in or the said suit on the day it was begun, and ters were satisfied and paid, and the action he cost of plaintiff. There was a trial to a erdict for plaintiff for $840.46. Defendant for a new trial, and, while this was pend- filed a paper remitting two hundred and ollars of the verdict, as all of the damages ie second count of the petition, excepting The motion for a new trial was overruled, ; rendered in favor of plaintiff for $541.46, ey's fee of seventy-five dollars. Defendant

Whipple, for appellant.

Nichols, for appellee.

r, J.—I. The appellant complains of the court to give to the jury two instructions sked by him, as follows: "1. That as to ie cause of action set out in the first count f the petition you should find for the efendant, because there is no evidence verdict can be found on said count in or. 2. As to the claim made by plaintiff nt of his petition, you are instructed that from the evidence that plaintiff paid to the five hundred and twenty-six dollars,

when the facts under which the same were claimed from him were known to him, then such payment was voluntary, and the plaintiff cannot recover the same back, unless you find that plaintiff paid said sum under compulsion which was illegal and unjust. The suing out of the attachment, and the garnishment thereunder, * * * by defendant's direction, is not such compulsion." The appellant claims that these instructions were in accordance with the following proposition of law: "To justify recovering back money paid, when all the facts were known to the party paying, such payment must not have been simply an unwilling payment, but a compulsory one, and the compulsion must have been illegal, unjust and oppressive." This is substantially the law as announced in *Dickerman v. Lord*, 21 Iowa, 342, and seems to be sustained by the authorities. *Murphy v. Creighton*, 45 Iowa, 183; *Benson v. Monroe*, 7 Cush. 131; 2 Greenl. Ev. sec. 123; *Custin v. City of Viroqua*, 67 Wis. 318; *Mays v. Cincinnati*, 1 Ohio St. 269.

But we do not think the instructions asked should have been given. They ignored the fact that the petition alleged, and some of the evidence tended to prove, that defendant agreed, as a part of the consideration for the payment of the money to him, to repay it if plaintiff could show that he was not indebted to defendant. In fact, the latter admits substantially that this was the case. It must be conceded that, so far as appellee was concerned, he knew all the facts as to his liability when he paid the money. He was charged with having wrongfully taken goods from the store and money from the till of defendant. He knew whether he had so taken them or not. Appellee urges that he did not know the facts upon which appellant's demand was based when the payment was made; but that only amounts to a claim that he did not know the evidence by which appellant could sustain his demand. Having paid the money with full knowledge of the facts in regard to his alleged liability, we think the appellee cannot recover on the first count of his petition without showing that he did not owe to defendant the money paid him. The release

rnished, the dismissal of the action and appellant of the money claimed, were a eration for the agreement to repay the shown not to be due. Hence the claim rt of the appellant, that the evidence appellee could have met all liabilities imself and wife by means of property chment, is immaterial.

sisted by appellant that the agreement ney paid by appellee required, as a con- on precedent to the commencement of ; therefor, that he show that he did not it when paid; that until such fact was was due from appellant. We do not air construction of the agreement. This , provide that nothing should be due from that suit should not be commenced til after it should be shown that he was he money. The language of the agree- in the petition, is as follows: "That in e said property this plaintiff, under pro- ig any indebtedness on his part to the upon the express verbal promise of the . Lauderbaugh, if plaintiff could show indebted to him, to repay said money to iff paid over to defendant the sum of five enty-six dollars." The defendant testi- his idea, all the time the negotiations for the attachment case were being had, that entitled to the money he would pay it e. It will not be presumed that the par- ment intended that appellant could keep d not belong to him, without liability, ould satisfy appellant that the latter was the money. The facts of the case are presumption. Appellee had been ppellant as a clerk, and if money and been taken, as claimed by appellant, st have been taken during that time. only prove his innocence by his own

statement, which he had made before the agreement was entered into, or by showing that the money and property had been taken by others who had access to it, or by showing that appellant had lost neither money nor other property. Proof of the second proposition could not, in the nature of the case, be well made, and the evidence as to the third was, or should have been, under the special control of appellant. The language of the agreement may properly be construed, in view of all the circumstances, to mean that, if appellee did not in fact owe the money paid, then the fact of payment would give to appellant no right to the money. Any other construction would make the agreement to repay practically inoperative, and that fact must have been known to and considered by the parties when they entered into it. If the money was not due from appellee, then it was wrongfully exacted. The stipulation for repayment was not designed for the protection of appellant, but for the benefit of appellee, and did not alter the character of appellant's acts.

III. The paragraph of the charge to the jury, numbered 2 1-2, is as follows: "If you should find that plaintiff paid the five hundred and twenty-six dollars to Lauderbaugh voluntarily, that is, if he paid the said sum while at the time having other means of immediate relief, and without fraud or compulsion, or extortion,—then such payment was voluntarily made, and cannot be recovered back in this action, even though Lauderbaugh promised to repay said sum in case plaintiff herein should satisfy Lauderbaugh that he had not taken or converted said money; and, in determining whether plaintiff did have other means of immediate relief, you should take into consideration the fact, if it be a fact, that plaintiff had, at the time he made said payments, other property than that held by the garnishment, by means of which he could have carried on his business and met his engagements." Appellant complains of this portion of the charge on the ground that it submitted to the jury matters not in issue. We think the complaint is well

8. —:—: recovery: instruction.

Neither fraud nor extortion is alleged in the
The first count is based upon the agreement
money in controversy. It charges that the
ppellant, on account of which it was paid, was
l unjust;" but the same might be said of any
in good faith, but under a mistake of fact,
not due. The evidence of plaintiff shows
time of the attachment he had ample means
ioney to meet existing obligations. Hence it
be inferred that the jury found that appellant
e payment of the money by fraud, compul-
ortion. The paragraph in question was not
ous in the particulars specified by appellant,
conflict with the views we have expressed as
; of the agreement.

omplaint is made of the next paragraph of
That also submitted to the jury the ques-
tions of fraud and extortion, and to that
extent, at least, was erroneous, for reasons
already stated. The petition does not
does the evidence tend to show, that Lauder-
w that the claim on which his action was
s not well founded. On the contrary, the evi-
s strongly to show that he acted in good faith
the entire transaction. He did not deceive
or the evident reason that the latter had
owledge of the facts upon which the claim
d than any one else could have. The allega-
e second count, that the writ of attachment
'ully, wilfully and maliciously sued out, are
pend upon the further allegation, that when
l out the defendant therein was not about to
his property with intent to defraud his credi-
ie plaintiff therein had no reasonable cause to
t he was.

ounsel discuss various rulings of the court in
and excluding evidence offered on the issues
raised on the second count of the petition.
The verdict of the jury necessarily shows
that the writ was wrongfully issued, but a

special finding shows that it was not sued out maliciously. The judgment rendered included but nominal damages for the cause of action alleged in the second count. Hence it is evident that the rulings, if erroneous, were not prejudicial; and they are not likely to be repeated on another trial; hence need not be further considered.

VI. It is insisted by appellant that the court erred in rendering judgment against him for an attorney's fee of seventy-five dollars. It was held in *Vorse v. Phillips*, 37 Iowa, 431, that such fee could not be recovered in an action on an attachment bond. But that case was decided under the provisions of the Revision of 1860. Section 2961 of the Code expressly authorizes such a recovery. *Weller v. Hawes*, 49 Iowa, 45. Because of the errors pointed out, the judgment of the district court is REVERSED.

5. ATTACHMENT: wrongful: action on bond: attorney's fees.

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75 488
106 481

75 488
114 108
114 732

75 488
125 153
125 157

75 488
133 265

BROWN v. THE TOWN OF GRAND JUNCTION *et al.*

Taxation: ASSESSMENT: APPEAL: CHANGE OF ISSUE BY AMENDMENT. Plaintiff was assessed by the town council upon goods and merchandise in the sum of ten thousand dollars. On appeal to the district court, it appeared that the assessment was wrongful, because he had no goods and merchandise; but the evidence showed that he might properly have been assessed that amount on account of moneys and credits. *Held* that it was error to permit defendants to amend their pleadings to conform to the evidence, and then to assess plaintiff with ten thousand dollars on moneys and credits, because the court could not try any other issue than that presented by the appeal. (See opinion for cases distinguished).

Appeal from Greene District Court.—HON. J. H. MACOMBER, Judge.

FILED, OCTOBER 13, 1888.

which it was clearly shown by the evidence that the assessment upon merchandise was wrongful and erroneous. But after the evidence was all introduced, and one argument had been made in the case, the defendant, in the view that the evidence showed that the plaintiff was properly assessable on ten thousand dollars of moneys and credits for the year 1887, by leave of the court, amended its answer to conform to the evidence, and demanded that the court change the assessment from merchandise to moneys and credits. The plaintiff demurred to the amendment. The demurrer was overruled, and the court, by its decree, found that plaintiff had sold his merchandise prior to January 1, 1887, but that he was properly taxable on ten thousand dollars, the proceeds of the sale of said merchandise. In other words, the court changed the assessment from an assessment upon personal property or merchandise to an assessment upon moneys and credits. The question for determination is, was the court authorized to make the change? The appeal was taken by the plaintiff from an assessment upon personal property,—merchandise. Appellant and appellee, by the appeal and by the issues presented by the pleadings, proceeded to the trial of that question. The plaintiff was not advised by the assessment, nor by any issue in the case, that he would be required to show more than that he did not have the property upon which the assessment was levied. He was not required to show that he did not have other property upon which he was liable to taxation. We think the court could not try any other issue than that presented by the appeal. The decree of the court finds no support in the cases of *Davis v. City of Clinton*, 55 Iowa, 549, and *Dunleith & D. Bridge Co. v. County of Dubuque*, 55 Iowa, 558. In those cases the appeals involved merely the question of the valuation placed upon property. What is said in the first-named case about the circuit court and this court being invested with the same powers as boards of equalization was merely in the way of argument on the question whether an appeal

8. **Practice: MISCONDUCT OF COUNSEL: DUTY AND DISCRETION OF TRIAL COURT: APPEAL.** It is improper and censurable practice for an attorney to make statements, designed to prejudice a party to the suit, which are not justified by the record in the case; and a question which charges dishonesty, though withdrawn, may be as prejudicial as a statement to the same effect. And it is the duty of courts to require attorneys to observe this rule, and, when it is violated, to set aside the verdict, unless satisfied that the misconduct was not instrumental in securing it. But an application to set aside the verdict must be determined by the trial court in the exercise of a sound discretion, and this court will not interfere unless an abuse of such discretion is shown.

Appeal from Cedar Rapids Superior Court.—HON. JOHN T. STONEMAN, Judge.

FILED, OCTOBER 13, 1888.

ON the twenty-fifth day of March, 1887, the plaintiffs, A. B. George, Weeks & Co., filed their petition in this action, in which they alleged that on the thirty-first day of January, 1887, they sold and delivered to defendants, Swafford Bros. and others, merchandise, for prices amounting, in the aggregate, to $1,028.72, all of which was due and unpaid. A bill of particulars, showing the articles sold, and the price of each, was attached to the petition. To this defendants answered, denying indebtedness; admitting that the goods described were delivered to them; but alleging that they were so delivered, pursuant to a verbal agreement, in exchange for certain notes and mortgage, amounting to eight hundred dollars, and two hundred dollars in money, payable in thirty, sixty, ninety and one hundred and twenty days; that defendants delivered the notes and mortgage, and made the first payment to plaintiffs; that plaintiffs refused to retain said notes, mortgage and money, and returned the same to defendants, by whom they are held subject to the order of plaintiffs. A trial to a jury was commenced. When the plaintiffs had offered their evidence in chief and rested, defendants offered to and did confess judgment in favor of plaintiffs for $233.02, and costs of suit up to that time. Defendants then filed a motion, asking the court to instruct the jury to return a verdict for them as to plaintiffs' alleged cause of action

ssed. This was overruled, and the trial con-

r all the evidence had been submitted, and the
ts to the jury had been made, but before the
been instructed by the court, the defendants
or a continuance of the cause, on the ground
had been misled by plaintiffs' pleadings. The
filed in support of the application alleged that
mony of one W. A. Preston was material to the
and that he had left the state on the evening of
1887. Counter-affidavits and objections were
plaintiffs, and the application was overruled.
s ruling was made, plaintiffs filed an amend-
their petition, for the purpose of making it
to the proofs. The amendment stated that it
ed that plaintiffs should take the notes and
, and investigate the same; and, if they were
be satisfactory to them on investigation, they
be accepted as payment, and credit for their
iven to defendants; but if they were not found
sfactory, and no other terms of payment were
pon, then defendants had the option to return
ion of the merchandise delivered to them called
ther goods;" that upon investigation plaintiffs
at the notes and mortgage were not satisfactory,
ed to accept them, and so notified defendants;
ndants refused to make other arrangements for
or the goods, and refused to return them.
its objected to the filing of the amendment, but
jection was overruled. Plaintiffs offered to
rification to the answer to their amendment.
its thereupon asked time to prepare an answer
ise to the matter set out in the amendment, but
ied. They then filed an answer, and the cause
mitted to the jury. A verdict and judgment
dered for plaintiffs for $1,028.72. Defendants

ry Rickel, for appellants.

s & Keeler, for appellees.

ROBINSON, J.—Appellants insist that the notes and mortgage in question were delivered by them, and received by appellees, as an absolute payment, to the amount of eight hundred dollars. Appellees claim that they were received conditionally, to be credited to appellants if found to be satisfactory, otherwise to be returned; that appellants had the right to return the goods when notified that the notes and mortgage were not satisfactory; and that, having failed to exercise that right, or make other arrangements for payment, they are liable for the agreed price of the goods.

I. Appellants contend that, since the original petition of appellees sought to recover for an absolute sale of goods, while the proof submitted tended to show a conditional sale, the cause of action set out in the petition was wholly unsupported by the evidence, and therefore that their motion to instruct the jury in their favor should have been sustained. We do not think this view is correct. If the facts were as claimed by appellees, when defendants failed to return the goods or make other arrangements to pay for them, the original transaction ripened into an absolute sale, and appellants' liability to pay the agreed price in money thereby became fixed. "Ultimate facts alone should be pleaded, and not the evidence which tends to prove such facts." *Barbee v. Hamilton*, 67 Iowa, 420. We think the allegations of the original petition were sufficiently broad to allow a recovery on the evidence submitted. *Haywood v. Woods*, 28 Iowa, 563. But it is said that the facts pleaded were not sufficient to apprise defendants of the evidence to expect, and that they were surprised by evidence improperly admitted to sustain an agreement set out for the first time in the amendment. That is hardly possible, for the reason that they put the facts involved in the transfer of the notes and mortgage in issue by their answer. *Cook v. Smith*, 54 Iowa, 636.

1. SALE: conditional: failure of condition: money demand: evidence.

II. It is said that the court erred in not allowing defendants time to procure the testimony of Preston, and

ANCE: to prepare an answer and defense to the amendment to the petition. The offering dence was closed on the ninth day of July, The counter-affidavits filed by plaintiffs show that was then in Cedar Rapids, and that his nce at the trial could have been procured by the lue diligence. It is also shown that he was in on the seventh day of the same month, when a na was issued for him. In our opinion due e to procure his testimony was not shown, nor re merit in the application for a continuance to

ENT: prepare an answer and defense to the amendment. From the nature of the issues, defendants must have been apprised that uld need to show all the facts in regard to the r of the notes and mortgage. We are inclined opinion that the amendment was not in fact l. *Cook v. Smith*, *supra*; *Lemke v. Daegling*, . 501. But, however that may be, there is in the record to justify the claim that additional as needed by defendants to enable them to the merits of their defense. The record shows e case was tried on the part of the plaintiffs, he beginning, on the theory disclosed by the nent. Therefore, we think the court properly the time asked.

. Appellants complain of the sixth and eighth par- s of the charge to the jury, on the ground that they

TIONS: ignore certain testimony of two witnesses, which it is claimed shows that the notes and mortgage were to be retained, and credit herefor if they proved to be as represented by nts. But the testimony of these witnesses, s a whole, does not sustain the claim of appellants rd to it. Detached portions of their testimony tend to sustain it. The court was under no ion to instruct the jury in regard to a theory not by the pleadings, nor claimed to be true by party, nor sustained by the testimony of any

IV. Appellants complain that the court excluded evidence of a conversation between one of the defendants and a third person, in the presence and hearing of one of the plaintiffs, had on the day the agreement of sale was made, and before the delivery of the goods. It is claimed that if the terms of sale were stated in that conversation substantially as they are now claimed to be by defendants, and the plaintiff who heard it remained silent, his silence would have been evidence of assent. It is true that, under some circumstances, the silence of a person whose duty it is to speak may operate as an estoppel. In this case it was not proposed to show that the agreement had been fully settled when the conversation was had, nor that the plaintiff who heard it in fact remained silent, nor that he knew at that time the terms of the agreement. On the contrary, it is shown that he did not make the agreement, and only knew its terms from what a partner told him. It does not appear that he was under any obligation, morally or otherwise, to speak; hence we conclude there was no error, in excluding evidence of the conversation.

5. ESTOPPEL: by silence: evidence.

V. Appellants insist that there was such misconduct during the trial, on the part of one or more of the counsel for plaintiffs, as to warrant a new trial. A defendant was asked, on cross-examination, in regard to a farm not in any manner involved in the case, "Is that the farm he placed a sixteen hundred dollar attachment on, that you swindled him out of?" It appears that the person referred to in the question, as having secured an attachment of the farm, was the one to whom defendants had sold their merchandising business after the transactions involved in this action. We discover no ground in the record for the question. Before it was answered, it was withdrawn.

6. PRACTICE: misconduct of counsel: duty and discretion of trial court: appeal.

One of the attorneys for plaintiffs, in his opening remarks to the jury, stated that "the Swaffords are traders; they traffic; they beat somebody;" and other matters,—some of which were shown to be true by the

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STOUT V. MARSHALL.

Statute of Limitations: REVIVAL OF DEBT BY WRITTEN PROMISE. Defendant in a letter to plaintiff, having referred to "those old notes," said: "You shall have every cent that is due on them." *Held* not sufficient to revive the debt upon a particular one of the notes which was at that time barred by the statute of limitations.

Appeal from Dallas District Court.—HON. A. W. WILKINSON, Judge.

FILED, OCTOBER 13, 1888.

ACTION upon a promissory note. The cause was tried without a jury, and judgment was rendered for defendant. Plaintiff appeals.

R. S. Barr, for appellant.

North & Nichols, for appellee.

BECK, J.—I. Among other defenses the defendant pleaded that the action is barred by the statute of limitations. The plaintiff alleges in his petition that the cause of action on the note is revived by a written admission that it is unpaid, and a new promise to pay it. The writing relied upon is in these words: "*Dan Stout*—Dear Sir: Ira Smith is here, and spoke to me in regard to our settlement of those old notes. I have no money now, but you shall have every cent that is due on them. C. Marshall." The district court held that this is not sufficient to take the cause of action out of the operation of the statute of limitations. The abstract does not show that evidence other than the writing was submitted or considered by the court below upon the issue arising under the defense setting up the statute of limitations. We cannot presume there was, and must therefore decide the case upon the written instrument alone.

written instrument which is claimed to
tion may, to a proper extent, be connected
ıse of action, and in some other respects sup-
ırol evidence. But we have no evidence of this
this case. We are to determine whether
instrument alone is sufficient to establish a
ıe cause of action. We think it is not.
may be assumed that the instrument refers
ın suit. But it is plainly not the only note
The instrument may be regarded as admit-
um is due on all of these notes, taken collect-
as containing a promise to pay such sum.
mission that an unstated sum is due on all
otes, and a promise to pay such sum, is not
n that anything is due on a particular note
se to pay an amount on it. The defendant
ument speaks of the "old notes" collect-
if a part of them were unpaid and a part
es language which expresses a promise to
er is due. But the language of the instru-
ys the idea that all of the notes are not
he promises to pay only such sum as may
hem. The word "due," in this connection,
ing." Clearly the instrument only relates
which a sum is due, and the language used
idea that something is not due on some of
written instrument is not a sufficient admis-
e note in suit is unpaid, nor is it a sufficient
pay the note. The judgment of the district

AFFIRMED.

DISTRICT TOWNSHIP OF HIGH LAKE V. ESPESET *et al.*

Schools: SCHOOL FUNDS: CONVERSION BY COUNTY TREASURER: ACTION ON BOND: DIRECTING VERDICT: EVIDENCE. The principal defendant had been county treasurer, and this action is brought upon his bond to recover the plaintiff's share of the general school fund. There was evidence tending to show that defendant had received the money, and that, in his final settlement with the board of supervisors, he represented that he had paid it to plaintiff, and thus obtained credit for the amount; that he held as a voucher for it a warrant issued by the county auditor in favor of plaintiff's treasurer, but not countersigned by the plaintiff's president and secretary, as required by law; that such warrant was delivered by the auditor to defendant at his request a few days prior to the end of his term of office; and that the money was never in fact paid to plaintiff. At the close of plaintiff's evidence the court ordered a verdict for defendant. *Held*—

(1) That such order was not justified on the ground that it was not shown that an apportionment had ever been made by the auditor of the fund in question, as required by law; for, conceding that such apportionment would be necessary to entitle plaintiff to maintain an action for its share, the representations of defendant to the supervisors were, as to him at least, *prima-facie* evidence thereof, which should have been submitted to the jury.

(2) That such order was not justified on the ground that it was shown that plaintiff had received in the aggregate, for the years included in defendant's term of office and the succeeding year, its full share of the fund; for an overpayment to it for the succeeding year would only be a matter for adjustment between it and the county, and not an offset to defendant's liability.

(3) That such order was not justified on the ground that the money was payable only on the auditor's warrant countersigned by defendant's president and secretary, and that the evidence showed that plaintiff had no such warrant; because the money was not demanded of the treasurer as such, but of one who had converted it to his own use.

Appeal from Emmet District Court.—HON. LOT THOMAS, Judge.

FILED, OCTOBER 13, 1888.

ET Espeset was treasurer of Emmet county
1, 1882, to January 1, 1884, and the other
the sureties on his official bond. This is
the bond to recover the sum of four
fifty dollars, which, as is alleged, came
of the treasurer for plaintiff, and which
over either to it or to his successor in
close of plaintiff's evidence the district
a verdict for defendants, and entered
the verdict returned in obedience to that
aintiff appeals.

rly, for appellant.

llen, for appellees.

–The fund in question is a portion of the
fund of the county, which is derived
evied by the board of supervisors for the
ools, and interest on the permanent school
lance-sheet presented by defendant to the
rvisors at the expiration of his term of
which his final settlement was made,
received during the year 1883 the sum of
nging to that fund; also, that he had
whole of that amount except $345.96, one
sement being $1,510, paid to district town-
iff proved that one item of the credit so
fendant was for four hundred and fifty
he had credited to himself on his ledger
n paid to it. It also introduced evidence
to prove that he held, as a voucher for
warrant issued by the county auditor
to pay that amount out of the fund to the
surer. The warrant, however, was not
by the president and secretary of the
hip, and it was shown that the auditor
o defendant, at his request, a day or two
piration of his term of office. There was

evidence, also, which tended to prove that the money was never in fact paid to plaintiff's treasurer.

I. The statute (Code, sec. 1781) makes it the duty of the auditor to apportion the fund, on the first Monday in April and the first Monday in September, among the several district townships and independent districts in the county, and by the next section he is required to immediately notify the president of each of the districts of the amount to which his district is entitled under the apportionment, and deliver to him his warrant on the treasurer for the amount. These warrants are required to be countersigned by the president and secretary of the district before the treasurer is authorized to pay them. One ground of the motion to direct the verdict was that the evidence did not show that the fund had ever been apportioned by the auditor. The theory of counsel is that, until such apportionment is made, the fund remains the common property of all the districts in the county; and no one of them can maintain an action to compel the payment to it of the sum which might be supposed would be due it if the proper division had been made. The correctness of this theory as a general proposition may well be conceded. If the money remained in the treasury, it is probably true that the district could not maintain an action to recover its share of the fund until the amount had been ascertained and set apart to it. But plaintiff's claim is that the money is not in the treasury, but has been converted by defendant, and that, by the false representations that the apportionment had in fact been made, and that he had paid over to it the amount ascertained by the apportionment to be due it, he had been allowed a credit for the amount in his settlement; and the evidence, as we have seen, tended to establish that claim. By claiming credit for the amount as having been paid to defendant, he in effect represented, not only that the payment had been made, but that all of the conditions essential to give him the authority to make it had been complied with. The warrant of the auditor for the payment of the sum named out of the fund is the only

But much the greater part of the sum was received in 1884, after the expiration of defendant's term of office. The fund, as we have seen, was diminished by the credit claimed and allowed him in the settlement. If plaintiff has received a portion of the fund, after that diminution, in excess of what would be coming to it upon a correct apportionment of it, that would be a matter for adjustment between it and the county or its officers, or, possibly, between it and the other districts, but the question between it and defendant would be in no manner affected by it.

III. It was also urged that, as the treasurer is authorized to pay the money only upon a warrant properly countersigned by the defendant and secretary, and as plaintiff does not have such, it cannot recover. But this claim is disposed of by what we have already said. If the money were in the treasury, it could be properly paid only on such warrant. But the claim is that it is not there, but was retained and withheld by defendant upon a false and unlawful claim. While the warrant would be essential to entitle plaintiff to recover it from the treasurer, it is not essential to its right to recover it from one who obtained it by the means alleged. The judgment will be

REVERSED.

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PIERCE V. HERROLD *et al.*

Real Estate: TAX TITLE: CONVEYANCE WITH WARRANTY: FAILURE OF TITLE: TAXES PAID BY WARRANTOR: INTEREST IN LAND. Where the owner of a tax title conveys with warranty, and the title fails, but a judgment is rendered in his favor for taxes paid by him on the land, and the amount thereof is in court, and afterwards a judgment is rendered against him on his covenant of warranty, he cannot claim that he had an interest in the land to the extent of the judgment for taxes, and that he is entitled to credit for that amount on the judgment against him on the warranty.

Appeal from Sac District Court.—HON J. H. MACOMBER, Judge.

FILED, OCTOBER 13, 1888.

THE facts are stated in the opinion.

warranty in the deed made by him to Herrold, under whom they claim, as above stated. Early answered the petition, and claimed and asked the court to decree "that the funds in court, to which he was entitled on account of taxes paid upon the land, may be taken and considered by the court as the amount of his interest in the land conveyed by his deed to David Herrold, and that said sum may be credited upon the judgment entered against him on his covenants of warranty in such deed." The court decreed that Early was entitled to the relief asked, and the defendants Bruner and Wickersham appeal, and claim:

I. That the decree of December 3, 1887, is an adjudication of the amount due from Early on the covenants of warranty, and that the only question left undetermined was, who was entitled to the money? and that it was not intended or contemplated by the decree that the money paid into the court by Early could in any event be reclaimed by him. It must be conceded that this claim is specious, at least, but the terms of the decree are so indefinite that we are uncertain as to how it should be construed, and therefore do not determine this question.

II. The appellants also claim that Early is not entitled to the relief granted, under the ruling of this court in *Hooper v. Sac County Bank*, 72 Iowa, 280; and we think this position must be sustained. The material facts in that and the case at bar are identical. The payment of the taxes by Early did not have the effect to give him an interest in the land. He was simply entitled to the money paid, with interest. It must necessarily follow that his grantees did not, by reason of the covenants of warranty, obtain any interest in the money paid by Early for taxes, and which was repaid him in pursuance of the decree in *Barke v. Early*. Early only conveyed the land, and if the title failed he was liable on his covenants of warranty. We are unable to conceive of any reason upon which the decree from which the appeal is taken can be sustained, and therefore, it must be REVERSED.

Company *vs.* Andrew Nelson, has been changed to Cherokee county for trial, and as the same questions are involved in each and all of said causes, and the plaintiff relies on the same chain of title in each and all of said causes, and for the purpose of saving expense, it is hereby stipulated and agreed that this court or judge shall have authority and jurisdiction to enter the same judgment in each of the foregoing numbered cases that the district court of Cherokee county may enter in the said cause of Andrew Nelson, No. 1,605, whenever either party shall file in the office of the clerk of this court a certified copy of the judgment of said district court of Cherokee county; and the clerk of this court is hereby authorized and directed to enter the proper order or judgment in each of said causes therefor; and the said judge of this court shall enter the exceptions of both parties to such judgment, and each and every part thereof; and the evidence and record in the said cause of the Western Land Company against Andrew Nelson, No. 1,605, shall be the record and evidence in each of said causes for all purposes of appeal and writs of error or other proceedings, to review such judgment as may be entered, except that the name of each respective defendant may be substituted in the place of Andrew Nelson in said record, and the description of the land claimed by the defendants, respectively; and that said cause, No. 1,605, shall be set down for trial on the third day of the next term of the district court of Cherokee county, Iowa (April 13, 1887).

"J. S. MONK,
"GEO. E. CLARKE, and
"BARRETT & CALLVERT,
"Plaintiff's Attorneys.
"WM. LAWRENCE,
"J. B. DUNN, and
"HENRY O'CONNOR,
"Defendant's Attorneys."

A judgment having been entered in No. 1,605, a certified copy thereof was filed in the office of the clerk of the O'Brien district court, and in pursuance of the

2. ——: VIOLATION OF INJUNCTION: PUNISHMENT AFTER APPEAL TAKEN AND SUPERSEDEAS BOND FILED. The taking an appeal from a decree abating and enjoining a liquor nuisance, and the filing of a *supersedeas* bond, does not suspend the injunction, but only the abatement of the nuisance, and for a violation of the injunction pending the appeal, the defendant may be punished for contempt. (Compare *Jayne v. Drorbaugh*, 68 Iowa, 711).

Certiorari to Clayton District Court.

FILED, OCTOBER 16, 1888.

THIS is an original proceeding in this court, the object of which is to review the action of the district court, refusing to punish one Hagensick for contempt in disobeying an injunction.

A. Chapin, for plaintiff.

Noble & Updegraff, for defendant.

SEEVERS, C. J.—The plaintiff commenced an action against J. L. Hagensick, and in May, 1887, a perpetual injunction was granted, restraining said Hagensick from manufacturing or selling intoxicating liquors, and ordering the abatement of the nuisance which the court found existed. Upon the day subsequent to the rendition of the decree the defendant in said action appealed to this court, and filed a *supersedeas* bond, as provided by law. Afterwards, at a subsequent term of court, the plaintiff filed a motion for a rule requiring the defendant to show cause why he should not be punished for contempt, on the ground that he had manufactured intoxicating liquor since the granting of the injunction, in disobedience thereof. At the hearing of the motion it was conceded that the defendant Hagensick had, since the taking of the appeal and filing of the *supersedeas* bond, "conducted the business of manufacturing beer in the premises described in the decree;" and that the "only act of the defendant claimed to be a contempt was the manufacturing of such liquor" since the rendition of the judgment perpetually enjoining him from so doing; and the court held that the "*supersedeas* bond prevents the punishment for contempt."

I. It is insisted that there is no authority for ewing on *certiorari* the action of the district court in refusing to punish an alleged contempt against the authority of the court. That such action could not be reviewed, in the absence of a statute, will be conceded; and

TEXT: oceedings unish: m certio- lies.

irst Congregational Church v. City of Muscatine, 2 a, 71, it is said: "These authorities are conclusive , in the absence of a statute, each court of record is sole and final judge in the matter of contempt." re was in force when this decision was made, and is , the following statute: "No appeal lies from an r to punish for contempt, but the proceedings may, proper case, be taken to a higher court, for revision, *ertiorari*." Code, sec. 3499. It is said this statute no application when the court refuses to punish the ndant. It will be conceded, for the purposes of this , that this is true in all cases where the court rmines that a contempt has not been committed. the court did not do, but held, as a matter of law, it could not inquire into and determine such tion, because it was prevented from so doing by eal and *supersedeas*. As no appeal lies, the judg- t of the district court must be reviewed in a *certio- i* proceeding if it can be done at all. The proper truction of the statute, we think, is that the action ie court may, in a proper case, be so reviewed; that the proceedings may be reviewed, whether the ndant has or has not been punished, in all cases n a substantial right, either public or private, is lved, which can only be protected or enforced by proceeding in contempt. That this is such a case think there cannot be any reasonable doubt.

II. It is insisted that the appeal and *supersedeas* the judgment, and prohibit the court from making any inquiry as to whether a contempt has or has not been committed; and in support of this position, section 3186, of the Code, is cited and relied on, the material portion of which is as follows: "An appeal shall

: viola- n of injunc- n: punish- nt after peal taken l supersc- s bond d.

not stay proceedings on the judgment or order, or any part thereof, unless the appellant shall cause to be executed * * * a bond to the effect that the appellant shall pay all costs and damages that shall be adjudged against the appellant on the appeal; also that he will satisfy and perform the judgment or order appealed from in case it shall be affirmed," and any judgment the supreme court may render, or order to be rendered. "When such bond has been approved by the clerk, and filed, he shall issue a written order commanding the appellee, and all others, to stay proceedings in such judgment or order. * * * No appeal * * * shall vacate or affect the judgment appealed from." It will be observed that the validity or effect of the judgment is in no manner affected by the appeal. It remains in full force, but process thereon is suspended until the appeal is determined. The judgment cannot be enforced by process, but a different rule prevails if the judgment is self-enforcing. *Jayne v. Drorbaugh*, 63 Iowa, 711. In the case at bar the nuisance cannot be abated until the appeal is determined. The effect of the *supersedeas* is to preserve the existing state of the matter, whatever it may be. It amounts to a suspension; and the relief obtained thereby is of a negative, and not of an affirmative, character. The injunction remains in full force, and the appeal and *supersedeas* do not affirm or give the party enjoined the right to violate it. If so, then, where a person is enjoined from committing waste on real estate, he may, pending an appeal, do irreparable injury to the estate; as when he is enjoined from removing heirlooms, or destroying them, which possibly have little or no money value. So, too, when one is enjoined from polluting a stream of water, thereby endangering the health of large numbers of people. In such cases, the terms, conditions of, and liability on, the *supersedeas* bond, do not afford any adequate relief or indemnity, and certainly this is so in the case at bar. It may be that, in a proper case, this court, in aid of its appellate jurisdiction, would stay all proceedings in contempt for a violation of an injunction until the appeal

ACTION in equity to subject certain real estate, the title to which is in the defendant Mary Glenny, to the payment of a judgment against the defendant William H. Glenny, on the alleged ground that the property was conveyed to Mary Glenny in fraud of the creditors of William H. Glenny, who is her husband. There was a decree in the court below dismissing the petition, and the plaintiffs appeal.

T. B. Perry, for appellants.

W. A. Nichol, for appellees.

ROTHROCK, J.—The property in question consists of a dwelling-house and lot, which was purchased by the defendants in March, 1886, and the title was taken, and is now held, by Mary Glenny. The burden of proof was on the plaintiffs to show that she was not the real owner, but that the consideration for the property moved from her husband. The court below was of the opinion that the plaintiffs failed to make the necessary proof, and a careful examination of the evidence has led us to the same conclusion. It appears from the evidence that the wife kept boarders during the absence of her husband, in the war of the Rebellion; and that, after hostilities ceased, the husband was kept in the service, in the medical department, at Vicksburg, Miss., and that the wife joined him at that place, and kept a boarding-house there. She accumulated some money in this business, which seems to have been a separate employment, independent of her duties as a wife. She loaned this money to her husband, and he afterwards repaid it, by furnishing the money with which the property was purchased. We have given attention to the argument of counsel as to the improbability of the account given of these transactions by the defendants as witnesses. As the plaintiffs attack the title, the burden is upon them to show that it is fraudulent; and this

1. FRAUDULENT conveyance: husband and wife: burden of proof.

ne by mere inference, based upon the assump-
e defendants' testimony is untruthful.
imed that the keeping of boarders by the wife
h a business, independent of her duties as a
wife, as authorized her to hold the proceeds
of her employment as her own. We think
otherwise. We have held that a wife who
ıe business of a washerwoman on her own
l from which she received compensation from
ers, and controlled and expended her earnings,
d in an independent employment, and had
o her earnings, under section 2211 of the
Mewhirter v. Hatten, 42 Iowa, 288.
ged that the money earned by the wife passed
ınd, because it was loaned by her to him prior
to the taking effect of Code, 1873; and that
under section 2499 *et seq.* of the Revision of
1860 she was bound to place notice of her
ownership upon record, in order to avoid
g her interest to those giving credit to her
The debt for the payment of which the prop-
ht to be subjected was contracted in 1883.
) of the Revision of 1860 was repealed by the
3; and in *Jones v. Brandt*, 59 Iowa, 332, it
at section 2499 of the Revision had no appli-
rties who became creditors of the husband
peal of that statute. That case is therefore
his question. We think the decree of the
rt must be

AFFIRMED.

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BRYANT & CO. v. FINK *et al.*

KRAUS v. THE SAME.

1. **Appeal**: PRACTICE: TRIAL DE NOVO: KIND OF ACTION. Where it appears from the record that in the trial below both the parties and the court regarded the action as an equitable one, and that it was tried upon that theory, it will be so regarded and tried in this court.

2. **Fraudulent Conveyance**: BY CHATTEL MORTGAGE: WHAT IS: EVIDENCE. A chattel mortgage given to indemnify a surety on a bond is based upon a valid consideration; but where it is also the purpose of the parties thereby to delay and hinder the creditors of the mortgagor, the mortgage is fraudulent as to such creditors. And in this case, where it appeared that the execution of the mortgage was, on the part of the mortgagor, only one of a series of transactions designed to delay and hinder his creditors, and force them to a compromise, and that the mortgagee, a few days after its execution, was engaged in aiding him in his fraudulent enterprise, and made no attempt to explain his conduct in that regard when he had the opportunity, *held* that he was properly chargeable with a participation in the fraudulent purpose when he accepted the mortgage.

3. ———: ATTACHING CREDITORS: AGREEMENT: JUDGMENT. In a contest for priority between a chattel mortgagee and attaching creditors, in which the mortgage was assailed as fraudulent, the mortgagee agreed to the appointment of a receiver upon the condition that the receiver should pay him the amount of one of the notes secured by his mortgage; and this was done accordingly. The court found that none of the notes was based on a good consideration. It was *held*, however, that, since one of the notes was paid under said agreement, by which the other creditors obtained an advantage, the mortgagee was entitled to hold the money so paid, and that the judgment should so provide.

Appeal from Cedar District Court.—HON. J. H. PRESTON, Judge.

FILED, OCTOBER 16, 1888.

ON the seventh day of February, 1887, defendant Fink executed to intervenor Shawver a chattel mortgage

official bond of Fink, as treasurer of a district township; and that, upon a settlement had subsequent to the execution of the mortgage between him and the board of directors of the district, he was found to be a defaulter in the sum of $1,002.51, which the sureties had been compelled to pay. Plaintiffs and the intervenors, except Sweeney & Co., alleged that the mortgage was given without consideration, and for the fraudulent purpose of hindering, delaying and defrauding the creditors of Fink. Other issues were presented by the pleadings, but no questions as to them arose upon the trial. Shawver, the Hamner Mercantile Company, and Cook and Augsberry each prayed for the foreclosure of his mortgage. The cause was tried to the court, who found that the Shawver mortgage was without consideration, and was fraudulent, and entered judgment directing that the funds in the hands of the receiver be applied in satisfaction of the claims of the other parties in the order of priority, as determined by the judgment. Shawver alone appeals.

W. G. W. Geiger, for appellant.

John M. Helmick, *George W. Ball*, *Mills & Keeler* and *Nathaniel French*, for appellees.

REED, J.—I. A question arises as to the manner of the trial in this court. Appellees contended that the cause should be regarded as an ordinary action, and be governed as to the trial by the rules applicable to that class of cases; while appellant claimed that the proceeding is in the nature of an action in equity, and is triable *de novo*. We find it unnecessary to determine to which class of actions the proceedings properly belonged originally; for we are satisfied by the record that in the trial below both the parties and the court regarded it as an equitable action, and it was tried upon that theory, and it will be so regarded here.

1. APPEAL: practice: trial de novo: kind of action.

II. As stated above, the mortgage to appellant, by its terms, is security for two promissory notes. The

on whether it is competent to show by
l object was, as alleged by appellant i
: intervention, was elaborately and al
nsel for the respective parties. But, i
ve taken of the case, it is not necessar
hat question. For the purposes of th
ed that the evidence is competent; an
ered it in reaching our conclusion; an
it doubt that at the time the mortgag
Fink was not indebted to Shawver in t
nine hundred dollar note, but that o
the parties had in view was to indemni
e other sureties on Fink's official bo
iability thereon.

I. We find that the mortgage was in f
As we regard the case as triable an
court, we of course give no we
ever to the findings of fact by
court, but reach our conclusio
examination of the evidence, an
of the circumstances which we find est
he five hundred and twenty dollar not
oney borrowed from a bank for the
ring a previous mortgage on the prope
bout to be foreclosed. Both Fink a
a note to the bank for the money;
early appear which was the principal
rety in that transaction. Nor is tha
be conceded that Shawver had the ri
nity against his liability on the bo
s necessary, as it appears to have
rge the prior mortgage in order to s
nity, he also had the right to do tha
ing it, and obtain security for t
ced, or indemnity against the liabilit
omplishing that result. All that he
ses then would have been legitimate,
had been to thereby secure or indemni
n that case it would have made no diff
ew that Fink was insolvent, and a def

that the effect of the mortgage would be to postpone the other creditors, or defeat the collection of their debts. But, on the other hand, if Fink intended by the transaction to hinder, delay or defraud his other creditors, and Shawver knew of that fact, and accepted the mortgage with the view of aiding in the accomplishment of that purpose, he will not be permitted, as against the other creditors, to retain the fruits of the enterprise, even though one of the objects he had in view was to obtain security for himself.

Now, the evidence shows conclusively that the execution of the mortgage was but one of a series of acts by which Fink intended to delay certain of his other creditors in the collection of their debts, and compel them to compromise with him, and accept a small fraction of the amount due them in full satisfaction of their claims. That such intention was fraudulent will not be denied; or that it will defeat the mortgage, if Shawver participated in it, is equally clear. If the case rested alone on the circumstances immediately attending the execution of the mortgage, it could hardly be said that they afford evidence of a fraudulent intent by appellant. But his conduct and actions, subsequent to that, show that he was then consciously lending his aid in furtherance of Fink's fraudulent design. That this subsequent conduct would not of itself defeat the mortgage is certainly true. But, unexplained, it affords evidence of the purposes he had in view when he accepted the mortgage, and he made no attempt to explain it. When conduct which is apparently suspicious or dishonorable is the subject of investigation, and the actor has an opportunity to explain it, and an interest in doing so, yet fails or refuses, it is but reasonable that the worst construction should be put upon it. The fair inference is that it is incapable of any explanation consistent with honesty and fair dealing. Two days after appellant received the mortgage, he aided in deceiving and misleading another creditor, when Fink's only object in the transaction was to gain time, and thereby be enabled to accomplish his purpose of compelling a compromise.

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THE DES MOINES INSURANCE COMPANY v. LENT *et al.*

1. **Fraudulent Conveyances**: CONSPIRACY: EVIDENCE. The evidence in this case considered (see opinion), and *held* insufficient to establish a conspiracy to defraud creditors by the conveyances in question, or to show bad faith in any of the conveyances.

2. ———: GOOD FAITH OF GRANTEE: CONSIDERATION. Where a daughter had money in her father's hands, and he conveyed land to her, and charged her on his books with the price of it, and she, though possibly not authorizing these transactions at the time, afterwards accepted the deed as being in accord with her wishes, and she had no knowledge of any claim that the conveyance was one of a series designed to defraud the creditors of a former holder of the land, *held* that she was a *bona-fide* purchaser for a sufficient consideration.

3. ———: ACTION TO SET ASIDE: INTERVENTION: LIS PENDENS. Where one creditor brings an action to set aside, in his favor, a conveyance alleged to be fraudulent as to him, and another creditor comes in and alleges that the conveyance is also fraudulent as to him, and asks for similar relief as to himself, he is not an intervenor, within the meaning of Code, section 2688, because he is not interested in the matter in litigation, nor in the success of either of the parties to the action, nor against both; but he is a mere interloper, and his pleadings are unknown to the law and can have no legal effect. Consequently, a petition of intervention, so called, in such a case does not give constructive notice, under the doctrine of *lis pendens* (Code, sec. 2628), that such person claims an interest in the land.

Appeal from Calhoun District Court.—HON. J. H. MACOMBER, Judge.

FILED, OCTOBER 17, 1888.

ACTION in equity to subject real estate in Calhoun county to the lien of a judgment. On the twenty-seventh day of March, 1884, the defendant Lent, being then the owner of the land in question, conveyed it to defendant H. J. Griswold. The instrument of conveyance was in form a warranty deed, but was intended to secure the payment of money, and was recorded two days after

valuable consideration. On the thirteenth day of September, 1887, Mrs. Hogg filed her petition of intervention, in which she claimed title to the land by virtue of the deed from Moody. A trial to the court below resulted in a decree in favor of defendants and intervenor. The plaintiff appeals.

M. W. Frick and *Geo. A. Smith*, for appellant.

E. E. Stevenson and *O. J. Jolley*, for appellee.

ROBINSON, J.—I. The petition charges that the conveyance to Griswold was executed and accepted to defraud the creditors of Lent, and that the conveyances to Moody were made in pursuance of a conspiracy between Lent, Griswold and Moody for the same purpose. In our opinion the evidence does not support these allegations. It is not shown that Griswold knew that Lent was owing any one but himself when he accepted the deed as a mortgage, and he conveyed to Moody by direction of Lent when his claim was paid by Moody. When Moody made the agreement to purchase of Lent, he had no knowledge of any debts owing by Lent, excepting certain ones which he paid to secure a conveyance, as a part of the purchase price. His object in obtaining a conveyance of the land was to secure the payment of a debt owing to him by Lent. The agreement to purchase was made ten days or two weeks before the deed to Moody was executed. When the deed was delivered, and the money due to Griswold, and perhaps to others, was paid, appellant's transcript was on file in Calhoun county. Moody, of course, then knew of Lent's interest in the land, and had constructive notice of the filing of the transcript. The judgment was therefore a lien on the land as against Moody; but, while he was informed of the judgment when he took the deed, he had no actual knowledge that a transcript of it was on file, and was not, therefore, guilty of fraud, so far as the record shows, in conveying the land.

1. FRAUDULENT conveyances: conspiracy: evidence.

II. The answer to the petition of intervention sets

the intervention of appellant in the action against Lent and Griswold, on the fourteenth day of March, 1887; the filing of the substituted and supplemental petition, and the request Moody be made a party thereto; the dismissal of intervention proceedings in that action; and the mencement of this. It is now insisted that inter- ɔr is not an innocent purchaser for value, and that the tion of intervention filed March 14, 1887, gave her ıtructive notice of the rights of appellant. The ence as to the payment by intervenor is not in all ects satisfactory. It appears that she had money in hands of Moody, and that at the time the deed was n to her she was charged with the consideration 000) on Moody's books. Whether she was present he time, or had authorized the execution of the l, and the charging to her account of the considera-, is not entirely clear; but the testimony is positive she accepted the deed, and that it is in accordance ı her desires. It does not appear that she had any al knowledge of appellant's claim. Therefore we ɔlude that she is a *bona-fide* purchaser for a suffi- t consideration.

– : good th of ıntee : con- eration.

III. Appellees insist that the petition of interven- filed by appellant, March 14, 1887, was not such a petition as is contemplated by section 2628 of the Code. Appellant claims that it was; and that, by virtue of the petition filed by ı intervenor and as plaintiff in this case, the inter- ɔr in this case purchased with constructive notice of ellant's rights. *Ferrier v. Buzick*, 6 Iowa, 258. A ɔn who has an interest in the matter in litigation, in success of either of the parties to the action, or ınst both, may become a party to the action. If he rvenes, he must join the plaintiff in claiming what ɔught by the petition, or must unite with the ndant in resisting the claim of plaintiff, or must and something adversely to both plaintiff and ndant. Code, sec. 2683. One who attempts to rvene in an action pending between other parties,

– : action set aside : ervention : pendens.

without bringing himself within the provisions of the statute, is a mere interloper, who acquires no rights by his unauthorized interference, unless objection thereto is waived. His pleadings are unknown to the law, and can have no legal effect. The application of the law in regard to constructive notice often results in great hardship, and an attempt to apply it should not be approved unless its requirements as to all material matters have been met. In this case appellant did not comply with the law in any respect. It was not interested in the action pending March 14, 1887. The success of the plaintiffs would not have aided it in enforcing its claim. They averred that the conveyance to Griswold was fraudulent as to them, not as to others. Appellant did not join them in their demand for relief, but asked similar relief for itself. It did not ask any relief adverse to plaintiffs. Therefore it did not intervene in accordance with law, and was properly dismissed from the case. It is unnecessary to determine whether a petition of intervention, properly filed, would give the notice provided by section 2628 of the Code, since no petition of intervention was in fact filed. We conclude that the decree of the district court must be

AFFIRMED.

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FERNOW V. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Railroads: RIGHT OF WAY: ABANDONMENT: TRESPASS BY RE-ENTRY. Under section 1260 of the Code, where a railroad company takes up its track from its fenced right of way, and the owner of the fee then removes the fences and encloses the right of way with the adjacent land, the company may, within eight years from the time of abandoning the use of the right of way, reënter the same, remove cross-fences, fence the right of way again, lay down its track thereon, and resume its use for the operation of its road, and will not by such acts be guilty of trespass. And the character of the road rebuilt and of the service thereon is immaterial, where the original grant of the right of way is not conditioned upon the character of the road and service thereon.

Appeal from Linn District Court. — HON. J. H. PRESTON, Judge.

FILED, OCTOBER 17, 1888.

THE plaintiff seeks by this action to recover dam- for trespass upon certain real estate. There was a by jury. The court directed a verdict for the ıdant. The plaintiff appeals.

Rickel & Crocker, for appellant.

Mills & Keeler, for appellee.

ROTHROCK, J.—On the thirty-first day of October, Solomon Fernow, who was then the owner of one lred and sixty acres of land, by his deed, duly exe- l and acknowledged, granted the right of way ıgh said land for a railroad to the Dubuque, Marion Vestern Railway Company. A railroad was con- ted upon said right of way; and it was operated some time in the month of November, 1878, when rack was taken up by the defendant as the successor terest of the Dubuque, Marion & Western Railway pany, and no trains of cars were run upon said ; of way until about July or August, 1886. The t of way was fenced by the railroad company. The ıtiff became the owner of the land as an heir of mon Fernow, deceased, and by conveyance from o-heirs. After the track was removed, he entered ı the land, removed the railroad fences, and built ıs across the right of way. These acts were done out authority from the railroad company. In July ıgust, 1886, the defendant took down cross-fences, laid down a railroad track, and run trains of cars ›on, and erected right of way fences on each side of road. These are the acts complained of by the ıtiff in his original petition, which was filed on the ty-eighth day of July, 1886, and within eight years the track was taken up and removed by the ıdant.

The district court appears to have been of opinion the defendant was not a trespasser by its reëntry . the land, because of the provisions of section 1260 ıe Code, by which, if a right of way "shall not be

used or operated for a period of eight years," the land and the title thereto shall revert to the owner of the land from which the right of way was taken. All of the rulings upon the competency of the evidence appear to have been based upon this thought. If the theory upon which the case was tried was correct, these rulings upon the evidence are not erroneous; and, as we have reached the conclusion that the defendant was not a trespasser in reëntering upon the right of way for the purpose of constructing a railroad of some sort, no further consideration need be given to rulings upon the evidence. It is not claimed that the reëntry was for the purpose of removing earth, or making excavations not authorized by the nature of the easement, as in *Vermilya v. Chicago, M. & St. P. Ry. Co.*, 66 Iowa, 606. If there was a right of reëntry for the purpose of rebuilding the railroad, the plaintiff cannot claim that the reëntry was a trespass, and base his claim for recovery upon the character of road rebuilt, and the manner of the railway service thereon. And there is nothing in the conveyance of the right of way, in the way of condition, proviso or limitation, as to the line of road, as in *Crosbie v. Chicago, I. & D. Ry. Co.*, 62 Iowa, 189. Counsel have elaborately discussed the question of abandonment, independent of the statute above cited. It is claimed that the right to claim a forfeiture, as it existed at common law, is not taken away by the statute, but that the statute gives merely an additional remedy. We do not think the principle invoked by counsel is applicable to the question under consideration. As we understand the statute, it defines what shall be regarded as an abandonment of a right of way. It definitely fixes the rights of the parties, and under its provisions nothing less than non-user for eight years will authorize the owner of the land from which it was taken to take possession of the land; and at any time within the eight years the company owning the right of way has the right to again take up the use for which the right of way was granted; and it is very plain that the

show that the mare was on or near the road when the train passed; that she was struck by the train; or was frightened by it, and ran into the cattle-guard in her fright. The marks and injuries on the mare did not indicate that she was struck by the train. The evidence, to our minds, shows that it is impossible that the mare was driven before the train into the cattle-guard; for, as we understand the facts, it was not so deep that the train could have passed over her while in it without killing her outright, or injuring her in other parts of her body which showed no injury. We think it is impossible that the animal was in the cattle-guard when the train passed, and it is just as impossible that the mare, becoming frightened by the cars, ran after them into the cattle-guard. We think there is absolutely no evidence to support the finding of the jury that the mare was thrown into the cattle-guard by the train. Such a conclusion is against all reasonable inferences arising from the facts of the case. In our opinion, the district court should have set aside the verdict as being utterly unsupported by the evidence. Other questions we do not consider, as our conclusion above announced will probably be decisive of the case.

REVERSED.

GADBOIS v. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

1. **Railroads**: INJURY TO EMPLOYE: EVIDENCE: CROSS-EXAMINATION. In an action for an injury to a car-repairer, caused by the alleged negligent moving of a train in response to an unauthorized signal, the conductor testified that he was standing on the platform and heard the bell ring, and that it caused him to turn and face the engine. On cross-examination he was asked: "You thought that a very strange occurrence,—the bell being rung,—did you not?" and "Rather surprised you, didn't it?" To these questions defendant objected as being incompetent, immaterial and not cross-examination. *Held* that the court erred in overruling the objection, and that an affirmative answer by the witness was prejudicial.

up said train. * * * At that time plaintiff was underneath said train, and not observing or knowing of said signal * * * and having no opportunity of avoiding said train," was caught and injured. "That said signal was given without authority, and acted upon by said fireman and engineer * * * carelessly, negligently and without regard to the danger to which the plaintiff was exposed, which danger was well known to them at the time. And that the engineer and fireman of said train caused it to be backed up, well knowing at the time, and having good reason to believe, the plaintiff was engaged in inspecting said train, and was in a dangerous position if said train should be moved; and that, well knowing the same, the said employes of defendant carelessly and negligently moved said train, * * * and said train was so moved without giving any proper warning or signal."

There was evidence tending to show that it was usual and customary for the plaintiff, on the arrival of trains at Cedar Rapids, to proceed to inspect the cars, and if the repairs needed were slight, he made them. Such inspection was also performed in part by tapping the wheels with a hammer. The evidence further tended to show that the plaintiff was standing outside of the track, and stooped down between two of the cars for the purpose of making such inspection, when the train was moved back, and he was thereby caught between the cars. The backward movement was caused by some unauthorized person directing the fireman to do so, and repeated by him to the engineer under the belief that it was given by the conductor. The evidence shows that the bell was rung; but as to whether this preceded the movement of the train, or, rather, as to the length of time that elapsed between the ringing of the bell and the commencement of the movement, the evidence was conflicting. The jury found, in answer to a special interrogatory, that such time did not exceed ten seconds. The plaintiff testified that he did not hear the bell.

I. The conductor of the train was introduced as a

y both parties, and, when on the stand as a witness for defendant, testified that he was ▸ standing on the platform at the depot, and ▸ heard the bell ring, and that "the ringing of the bell caused me to turn around and ngine." On cross-examination, he was asked ring questions: "You thought that was a nge occurrence,—the bell being rung,—did " The defendant objected to this question material, incompetent and not cross-examina- ese objections were overruled, and the witness "I did." He was then asked, "Rather you, didn't it?" The same objections were and the witness answered, "Yes, sir." e other questions and objections thereto, and f a similar character. The defendant insists ourt erred in overruling the objections to the questions and others of like character. It tedly true that witnesses, on cross-examina- be required to state any facts which have a to weaken or explain their evidence in chief, pect to such evidence the court is invested with scretion; but while this is so, a party, under ise of a cross-examination, cannot be per- introduce incompetent evidence. All that the id in his examination in chief which is mate- at when the bell rung he turned towards the Why he so turned, or that he was surprised, terial and incompetent, and had no tendency that the bell was not rung, or any bearing question. If he was surprised at the ringing l, the jury might infer that it was an unusual nce, and tended to show negligence.

es this, the questions were so framed as to issions from the conductor that the ringing of which it is conceded was a warning to announce nt of the train, was unusual under the circum- nd therefore competent to be considered by the nding to show negligence. This must have bject of counsel in eliciting the evidence; and

it can be readily seen that such evidence, commented upon by able counsel, probably would be regarded by the jury as having a material bearing on the question of negligence. Especially is this so when the material inquiry was whether the train had been so moved or not. As bearing on the question under discussion, see *Locke v. Sioux City & P. Ry. Co.*, 46 Iowa, 110.

II. In the ninth paragraph of the charge, the court told the jury that the defendant was not "responsible for the acts of persons not in its employ, nor under its control." As the signal to move the train was given to the fireman by a person not in the employ of the defendant, the court, in effect, told the jury that such fact should not be considered by them in determining the question of negligence. In other words, the claim of negligence stated in the petition, based on the signal, was withdrawn from the jury. But in the thirteenth paragraph of the charge the jury were told that "some evidence has been adduced showing that the suggestion * * * to back the train came to the fireman from a person not in the defendant's employ, nor under its control. This fact does not establish negligence on the part of the defendant. It may be considered by you, however, in explaining in what manner the train was moved." The court, we think, properly instructed the jury that the defendant was not responsible for what persons not in its employ did, and in withdrawing from the jury the question of negligence based thereon, for the reason that it was immaterial whether the train was moved in response to a signal or not. The signal, by whomsoever given, was not the proximate cause of the injury. The material question was whether it was moved in a proper manner, and at a proper time; and therefore we think it follows that the jury should not have considered such evidence for any purpose. It had no legitimate bearing on the question of negligence, which was the only question in the case. But, as we have seen, the court directed the jury to consider the evidence as to what was done by persons not in its employ, as explanatory of the manner in

2. —: —: Instruction: evidence.

the train was moved. In so directin
urt erred, for the reasons stated, and s
evidence had no tendency to show the
the train was moved. As bearing on
see *Hammer v. Chicago, R. I. & P.*
625, and *Meyer v. Cullen*, 54 N.
the jury based, in part at least, the gen
e fact that an improper signal was giv
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manner it did, is evident from their
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iff was injured by the negligence of
yes, the jury said, "Yes." The ne
s follows: "If you state 'Yes' to th
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g his train, and, if so, in what did the
t?" This question was answered
, he moved on a signal improperly gi
n." These questions and answers sh
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een given the fireman by an improper
tant, and it is apparent, we think, th
erdict was, in part at least, based there
eason a new trial should have been gr
t understand it to be claimed that t
egligent because he moved the train in
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g to show negligence on the part of th
d the right to rely on the fireman. T
ve the train came from the fireman's

For the reasons above stated, the jud

be reversed, and, on another trial, the question of negligence, based on the signal or direction to move the train, should be eliminated. We do not regard it as material to consider the other errors discussed by counsel. Many of them certainly will not arise on another trial.

REVERSED.

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DONNELLY V. CEDAR COUNTY.

1. **Appeal: FROM RULINGS ON EVIDENCE: NO PREJUDICE SHOWN.** In an action for injuries on account of a defective bridge, there was judgment for the defendant, and plaintiff appeals, and assigns errors only upon rulings on evidence. But there is nothing in the abstract showing that he introduced or offered any evidence of damages sustained by him. *Held* that the errors complained of must, in the absence of such evidence, be regarded as without prejudice.

2. ——: **JURISDICTION: NO SHOWING OF APPEAL TAKEN.** This court has no jurisdiction of a cause in which the abstract fails to show that an appeal has been taken or attempted.

Appeal from Cedar District Court.—HON. J. H. PRESTON, Judge.

FILED, OCTOBER 18, 1888.

ACTION to recover for damages alleged to have been caused by the failure of defendant to rebuild a bridge which had been washed away, and to guard the approaches thereto. There was a trial to a jury, and verdict and judgment for defendant. Plaintiff appeals.

J. N. Neiman and *Wm. P. Wolf*, for appellant.

E. I. McCoy and *W. N. Treichler*, for appellee.

ROBINSON, J.—Plaintiff has filed in this court an abstract in which he is styled "appellant." This shows that he seeks to recover for injuries to himself, to a horse, harness and buggy. The defendant has filed an additional abstract, which is not denied, which shows that its answer denied plaintiff's allegations of damage

.ness. Evidence is set out in both abstracts, hows that any evidence was introduced or ı tended to show that plaintiff had in fact ımage of any kind. The errors assigned ively to rulings of the court on the intro- vidence as to the character of the bridge in herefore it does not appear that any preju- ave resulted from the alleged errors, nor und exists for reversing the judgment. But act shows that an appeal has been taken or hence it is not made to appear that this risdiction of the cause. *Talbort v. Noble*, '; *Plummer v. People's Nat. Bank*, 74 *Phillips v. Follet*, 69 Iowa, 39. The cause

DISMISSED.

MOORMAN V. GIBBS.

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ıt: UNRECORDED DEED: PRIORITY. An unrecorded deed dence over a subsequent attachment or judgment, creditor has no notice thereof.

RVENTION: RELEASE: WHO AFFECTED BY. A settlement attachment plaintiff and an intervenor, whereby some erty is discharged, does not affect the rights of one rior unrecorded deed of attached real estate.

t: FORMER ACTION DISMISSED. This action to quiet title l by the fact that plaintiff began a prior action for the se, which was dismissed before this one was tried.). *Frost*, 49 Iowa, 183).

ı *Mahaska District Court.*—HON. J. K. JOHNSON, Judge.

FILED, OCTOBER 18, 1888.

to quiet the title in plaintiff to certain city a trial on the merits there was a decree for efendant appeals.

: *McCoy*, for appellant.

. *Lacey* and *W. R. Lacey*, for appellee.

BECK, J.—I. The facts, briefly stated, upon which the cause is to be determined, are as follows: One M. B. Sturges, then the undisputed owner of the lots, conveyed them, April 12, 1883, to plaintiff. The deed was not filed for record until March 17, 1885. May 5, 1883, defendant caused the lots and other property to be attached in an action against W. B. Sturges. In this action M. B. Sturges intervened, claiming all the property attached. Pending this action, a settlement was had between defendant and M. B. Sturges; and under it all the property attached, except the lots involved in this action, was discharged from the attachment. The index of the record of plaintiff's deed misdescribed the lots in controversy. A tenant, occupying the property when it was conveyed to plaintiff, was in possession when defendant attached the lots. Actual notice of the condition of the title is not shown to have been had by defendant. Before the commencement of this action, another suit had been commenced, which was dismissed by plaintiff before this suit was tried.

II. The attachment did not affect plaintiff's title, for an unrecorded deed will hold against an attaching creditor without notice. An attaching or judgment creditor does not take precedence over the holder of an unrecorded deed whose title is paramount to any attachment or judgment, though the creditor had no notice thereof. See *First Nat. Bank of Tama City v. Hayzlett*, 40 Iowa, 659, and cases cited in 2 McClain, Dig. 443. This is the settled rule of this state. The plaintiff's deed, therefore, must prevail against defendant without regard to notice as to the title, actual or constructive, which he had or had not. We need not, therefore, inquire whether defendant had notice of plaintiff's title.

1. ATTACHMENT: unrecorded deed: priority.

III. The settlement between defendant and M. B. Sturges did not affect plaintiff's right. She was not a party thereto, and she cannot be affected by the acts of mere strangers, who have no power to control or affect her title and interest in the property.

2. ——: intervention: release: who affected by.

The prior action brought by plaintiff, having
nissed before trial in this case, does not affect
her rights, nor will this suit abate by reason
ion thereof. *Rush v. Frost*, 49 Iowa, 183.
The case demands no further consideration.
ment of the district court is

AFFIRMED.

HABLICHTEL v. YAMBERT *et al.*

iracy : TO EXTORT MONEY : VOLUNTARY PAYMENT : PLEADING. ion for damages for the extortion of money by a conspiracy :hat a note was first obtained, and that it was afterwards ›cause of the continued existence of the fear excited by ras said to the plaintiff at the time the note was obtained. at the petition was not bad as showing a voluntary pay-

——— : ——— : **EVIDENCE.** Where a note was obtained of ntiff through fear, by means of a conspiracy, and was paid ays afterwards, and there was evidence tending to show was agreed that plaintiff would get the money and pay e within that time, and plaintiff testified that she paid a her continued fear, and she was a German, sixty-one years aperfectly acquainted with our language, and with no ›ounsel her in the matter, *held* that the jury was justified in that the payment was made, not voluntarily, but through

ctions : REPETITION NOT REQUIRED. Where the court has id fairly charged the jury upon the issues, no prejudice from a refusal to give a further instruction.

SPECIAL INTERROGATORIES : REFUSED AS IMMATERIAL. There ror in refusing to submit special interrogatories, when the s, however given, could not affect the general verdict.

CONSPIRACY : FORM OF VERDICT. In an action based upon iracy, where the evidence tended to establish the alleged acy, the court properly instructed that the verdict should r for or against both of the defendants.

from Linn District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, OCTOBER 18, 1888.

ACTION to recover damages of the defendants upon the ground that they entered into a conspiracy to extort money from the plaintiff, and, in pursuance of such conspiracy, did extort money from her. The material allegations of the petition were denied. Trial by jury, verdict and judgment for plaintiff, and defendants appeal.

Chas. W. Kepler and *Frank Fitzgerald*, for appellants.

Rickel & Crocker, for appellee.

SEEVERS, C. J.—I. It is insisted that no cause of action is stated in the petition, and therefore the court erred in overruling a motion to arrest the judgment based upon this ground. Counsel, in their argument in support of the claim that no cause of action is stated, seem to rely on the fact that the defendants obtained a note for seven hundred dollars, which the plaintiff, three days afterwards, voluntarily paid, as is claimed. But this is not admitted in the petition. It is true, it is stated that the note was obtained and paid, but we understand the petition to state that the payment was because of the continued existence of fear, excited by what was said to the plaintiff at the time the note was obtained. That a cause of action is sufficiently stated in the petition to sustain the verdict, we have no doubt. The petition, possibly, should have been more specific as to whether the plaintiff paid the note through fear, excited by threats made when it was obtained, but as defendants failed to ask that it be made more specific, they cannot now complain of the want of particularity of the petition.

1. CONSPIRACY: to extort money: voluntary payment: pleading.

II. It is said that the verdict is contrary to two paragraphs of the charge, in which the jury were told that the plaintiff could not recover unless she paid the note through fear, or if the plaintiff voluntarily gave or paid the note, but that in

2. —: —: —: evidence.

r to recover, she must have been induced to give pay in pursuance of the conspiracy. We have d the substance of the instructions favorably to the ndants, and yet we are unable to concur in the propo- n that there is no evidence upon which the verdict be sustained, conceding the instructions to be, in t, as we have stated. It is said there is no evidence ing to show that the plaintiff paid the note three after it was executed, through fear, and in pursu- of a conspiracy. In considering this question it ld be conceded that the note was obtained through and in pursuance of the conspiracy. Now, was the nent of the note induced by the same means? There evidence tending to show that it was arranged or ed that the plaintiff would get the money within the stated, and pay the note, and it was for the jury to whether this was a part of the conspiracy. The ntiff testified that she paid through fright, or that was frightened when she did so; and the evidence ed to show that such fright was caused by threats e when the note was obtained. We think it was he jury to say, under all the circumstances, whether plaintiff's evidence was true or not; and in deter- ng this question it was material to consider that the ntiff was about sixty-one years of age, and a German, erfectly acquainted with our language, and that e was no person on whom she could rely for advice sistance in relation to the matter.

III. It is said the court erred in refusing an instruc- asked by the defendants. The matters relied on as showing the conspiracy are stated at length in the petition, and consist of false representations of several distinct matters, ch show the conspiracy, and there was evidence tend- to sustain the allegations of the petition. The ence tended to show that it was represented to the ntiff that one of the defendants had an affidavit in possession which seriously affected a member of plaintiff's family, or, rather, would exonerate a ber of plaintiff's family from a serious charge, and

Instructions: Petition not required.

that such defendant might or would destroy such affidavit, and that plaintiff should obtain possession thereof. When the note was executed, the affidavit was given to the plaintiff, and the court was asked to instruct the jury that it should not be considered in determining whether the note was paid under fear or duress. This instruction was refused on the ground, we are justified in supposing, that the court in the charge had sufficiently instructed upon that question; and we feel constrained to hold that the case was fairly and sufficiently submitted to the jury in the charge of the court, and therefore the defendants were not prejudiced by the failure to give the instruction asked by them.

The defendants asked the court to submit certain special interrogatories to the jury, which the court refused, and did not err in so doing, for the reason that the interrogatories ask the jury to determine as to the existence of certain isolated facts, which, if answered either way, would not have affected the general verdict; and, conceding all of them as answered as the defendants desire, we are unable to see the materiality of the findings. It is said the court erred in instructing the jury that the verdict must be either against or for both defendants. This depends upon the question whether or not a conspiracy was established. The action was based on a conspiracy. If a conspiracy was not established, the verdict should have been for the defendants; but there was evidence, we think, tending to show a conspiracy. Whether it was sufficient was for the jury to say. The court did not err in instructing the jury as it did, and as we are unable to discover any error in the record, the judgment of the district court must be

4. ——: special interrogatories: refused as immaterial.

5. ——: conspiracy: form of verdict.

AFFIRMED.

THE STATE v. ILL.

eal: CRIMINAL CASE: RECORD. This cause being submitted upon hat purports to be a transcript of the record, but which is in no anner certified or authenticated, it cannot be considered, and the udgment is affirmed.

eal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, OCTOBER 19, 1888.

THE defendant was indicted and convicted for ing a nuisance, by maintaining a place for the wful sale of intoxicating liquors. He now presents case on appeal to this court.

No appearance for either party.

BECK, J.—The case is presented here without assignt of errors, brief or argument. It is not in a condito permit its consideration. There is submitted to hat purports to be a transcript of the record of the t below, but it is in no manner certified or authented, as required by the statute. It consists of copies hat purport to be papers and proceedings and the gment in the case. But the papers are neither, col. vely nor separately, certified nor authenticated. The sion in the case is affirmed, and *procedendo* will e requiring the court below to proceed in the enforcet of its judgment.

AFFIRMED.

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VON GENECHTIN V. THE CITIZENS' INSURANCE COMPANY.

1. **Fire Insurance**: ACTION ON POLICY: PLEADING: PROOFS OF LOSS: WAIVER. A petition in an action upon a policy of fire insurance, which shows that proofs of loss were not made within the time and in the manner required by the policy and by section 8, chapter 211, Laws of 1880, and which fails to state facts showing a waiver of such proofs, is bad on demurrer.

2. ———: ———: ———: PREMATURE ACTION. A petition in such case is bad on demurrer when it does not show the lapse of time required by the policy for the maturity of the claim, nor that required by the statute (sec. 8, chap. 211, Laws of 1880), before the action can be commenced.

Appeal from Des Moines District Court.—HON. CHARLES H. PHELPS, Judge.

FILED, OCTOBER 19, 1888.

ACTION on a policy of insurance to recover for a loss by fire. A demurrer to the petition was overruled. Defendant electing to stand on its demurrer, judgment was rendered in favor of plaintiff for $470.44 and costs. The defendant appeals.

Hurley & Hale, for appellant.

D. N. Sprague, for appellee.

ROBINSON, J.—The pleadings show that on the first day of August, 1886, defendant executed the policy in suit; thereby insuring plaintiff against loss by fire on his building to the amount of five hundred dollars. In February, 1887, the building was injured by fire; and the loss, amounting to $29.56, was promptly paid. On the fifteenth of May, 1887, the building was destroyed by fire to the damage of plaintiff in the sum of $470.44. On the next day after the fire plaintiff caused a letter to

ı to the agents of defendant who procured the , and who caused an adjustment of the Febru- ıtating that the property had been destroyed d was a total loss. On the day after this letter en the agents aforesaid went to plaintiff to ɔout the loss, and informed him that it would ɐd. A short time after this, and within thirty ıe date of the fire, said agents assured plaintiff ɔss would be paid. On the eleventh day of 7, said agents advised plaintiff to sell his home- . estate, and pay certain claims on account of ɐfendant had been garnished, alleging that t would pay his loss. That shortly after this, n sixty days of the time of the fire, the defend- ıster came to pay the loss; but, on seeing the fused to pay it. On the twenty-seventh day ıt, 1887, proof of loss was sent to the secre- ittsburgh, with the request that, if further ı desired, that fact should be indicated. It is n whether this proof was verified, nor how it . The receipt of the proofs was never dged.

he first ground of the demurrer was as follows: ition * * * shows that no written proof of loss, accompanied by affidavit of facts n and extent of loss, was given to defendant ɯ within the time required by law and the conditions of the policy sued on." The s of the policy referred to require that, where occurred, the assured shall give to defendant e notice of the fact; and that as soon as ıfter the fire a particular statement of the loss, ,h, showing the facts in regard to the fire, the ıe assured to the property insured and other rendered to defendant. We are of the opinion luties of plaintiff in regard to notice and proof e regulated by section 3, of chapter 211, of the the Eighteenth General Assembly. By the s of that section it was only necessary for

plaintiff to prove the loss of the building; that he had given defendant notice in writing of the loss, accompanied by an affidavit stating the facts as to how the loss occurred, so far as they are within his knowledge, and the extent of the loss; and that such notice was given within sixty days from the time the loss occurred. It being necessary to prove these facts, they should have been averred. The petition shows affirmatively that the proof of loss was not given within the time required by statute. The conditions of the policy do not extend the statutory time, but attempt to restrict it. It is claimed by appellee that the acts of the agents of defendant had the effect to waive the conditions of the policy and the requirements of the statute. But the petition fails to show any fact from which a waiver may be presumed. It is not shown that the agents who procured the insurance had any authority to bind the defendant in the matter of adjusting the loss or agreeing to pay it. The fact that they "caused an adjustment" of the February loss shows nothing as to their authority. The petition does not allege in terms nor in effect that these soliciting agents had any authority to obligate the defendant to adjust or pay the loss. The fact that an adjuster was sent to inquire into the matter tends to show that the soliciting agents had no authority as adjusters. But it is not shown that proof of loss was waived by the adjuster, nor that the soliciting agents attempted to waive it. Therefore plaintiff omitted to furnish it at his peril. Plaintiff not only failed to comply with the conditions of the policy and the statute as to time within which to furnish proof of loss, but he fails to show that the proof furnished was under oath. In our opinion, the first ground of the demurrer was well taken.

II. The second ground of the demurrer is that the action was commenced prematurely. The petition shows that proof of loss was made August 27, 1887, and sent to Pittsburgh. It does not show that it was ever received by defendant. The petition was filed October 7, 1887. The policy in suit provides that the claim for loss thereunder shall not

2. —: —: —: premature action.

due and payable until sixty days after the full com-
etion of all the requirements therein contained. One of
ese requirements was that a statement of the loss
ould be rendered to the company, which should be
gned and sworn to by plaintiff, and should show his
owledge as to the origin and circumstances of the fire,
d other facts. The statute already cited provides that
action shall be begun within ninety days after notice
the loss has been given. The notice required by the
tute we think includes the affidavit showing the facts
regard to the loss which must accompany it. There-
re we conclude that the petition does not show the
ose of time required by the policy for the maturity of
e claim, nor that required by statute before the action
n be commenced; and that the second ground of the
murrer was well taken. Sec. 3, chapter 211, Acts 18th
n. Assem.; *Quinn v. Capital Ins. Co.*, 71 Iowa, 615.
e find it unnecessary to determine the sufficiency of
e remaining ground of the demurrer. For the error
the court below in overruling the demurrer its judg-
nt is REVERSED.

BALDWIN v. WESTENHAVER *et al.*

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92 550

order: BAIL AFTER CONVICTION PENDING APPEAL. Under chapter 108, Laws of 1878, which provides that "no defendant convicted of murder shall be admitted to bail," and which must be regarded as repealing all prior inconsistent legislation, one convicted of murder in the second degree is not entitled to be admitted to bail pending an appeal to this court from the judgment of conviction.

Original proceedings in habeas corpus.

FILED, OCTOBER 19, 1888.

THE plaintiff presented his petition to the HON. SEPH R. REED, one of the judges of this court, upon hich a writ of *habeas corpus* was issued to M. West-haver, sheriff of Jefferson county, and George W. osley, warden of the penitentiary at Fort Madison, eging that he was unlawfully restrained by them of s liberty. Upon return of the writ the cause was bmitted to the court.

M. A. McCoid, for plaintiff.

J. S. McKewey, for defendants.

BECK, J.—I. The undisputed facts of the case are these: Plaintiff was duly indicted, and convicted of murder in the second degree. He perfected his appeal to this court, and thereupon asked the district court to order and fix bail, as he desired to be kept in jail pending his appeal. This was refused. Upon a proper transcript of the judgment of the district court the sheriff delivered the plaintiff to the warden of the penitentiary, in whose custody he remained. The plaintiff claims that under the statutes of the state he is entitled to be admitted to bail pending his appeal in this court. This claim is denied by defendants. No other question is presented by the case than the one involved in the issue there presented by the parties.

II. The case may be more clearly presented by reciting all the provisions of the statute applicable to the question before us. They are in the following language (Code, sec. 4107): "All defendants are bailable, both before and after conviction, by sufficient surety, except for offenses heretofore punishable with death under the laws of the state, when the proof is evident and the presumption great." Section 4511: "In all cases, except murder in the first degree, the court rendering judgment must make an order fixing the amount in which bail must be taken, and there shall be no execution of the judgment until such order is made." Section 4528: "An appeal taken by the defendant does not stay the execution of the judgment, unless bail be put in, except as provided by the next section." Section 4529: "When the judgment is imprisonment in the penitentiary, and an appeal is taken during the term at which the judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, it may, in its discretion, order the sheriff or officer having the defendant in custody to detain him in custody, without taking him to the penitentiary, to abide

dgment on the appeal, if the defendant desire it." n 3848: "Whosoever kills any human being nalice aforethought, either expressed or implied, lty of murder." Section 3849 (as amended by quent legislation): "All murder which is perpe- by means of poison or lying in wait, or any other l, deliberate and premeditated killing, or which is itted in the prepetration or attempt to perpetrate rson, rape, robbery, mayhem, or burglary, is er in the first degree, and shall be punished by , or imprisonment for life at hard labor in the state ntiary, as determined by the jury, or by the court, defendant pleads guilty." Section 3850: "Who- ommits murder otherwise than is set forth in the ling section is guilty of murder in the second e, and shall be punished by imprisonment in the ntiary for life, or for any term not less than ten " Chapter 103, Acts Seventeenth General ably, amending section 4107 of the Code: "No dant convicted of murder shall be admitted to

nder the provisions of the Code prior to the statute noted, persons convicted of murder not punishable leath could have been admitted to bail (Code, sec. ; and except in cases of murder in the first degree, ccused could be admitted to bail after conviction. 4511. But chapter 103, Acts Seventeenth General ably, forbids bail to a defendant convicted of er. It is obvious that this provision is in conflict the other statutes under which, prior thereto, bail have been allowed to one convicted of murder in cond degree. The language of the statute, being bitory in form, was of course intended to repeal all ns of the Code permitting bail which this statute bits. Under prior statutes bail was permitted in n cases. Under this statute it is prohibited in these ases. It is to be regarded as the repeal of the inconsistent legislation. It is plain that the pro- on extends to murder in the second degree, of . plaintiff in this case was convicted. It prohibits

bail in all cases of murder. Murder in this state is of two degrees,—first and second; and both of these degrees are within the designation of the term "murder," as defined by the statute of the state. This is made obvious by the consideration of Code, sections 3848, 3849. The prohibition of the statute extends to murder in the second degree, and in no case can bail be allowed to one convicted of that crime. The question demands no further discussion. As bail was prohibited to defendant, the district court exercises no discretion in the matter, and rightly refused defendant's application for bail; for, under the plain language of Code, section 4529, the discretion may only be exercised in cases where bail may be given, and the accused is unable to give it. The petition for the writ of *habeas corpus* is

DISMISSED.

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OSGOOD V. BAUDER & CO. *et al.*

1. **Sale**: SEVERABLE CONTRACT: GAMBLING: STATUTE OF ILLINOIS: PLACE OF PERFORMANCE. Defendants contracted with plaintiff's assignor for one hundred and fifty cars of coal, to be delivered free on board cars at Chicago within a certain time, and at a certain rate per ton to be paid in thirty days; with the privilege of ordering, upon the same terms, two hundred and fifty cars more of said coal. *Held*—

   (1) That the contract was one to be performed in the state of Illinois where the coal was to be delivered, and that it was to be judged as to its validity by the laws of that state.

   (2) That the contract was severable,—the first part being a contract of actual sale, and the second part a contract for the right to purchase or not at defendant's option.

   (3) That the optional part of the contract was void under the statute of Illinois, which provides: "Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or any other commodity * * * shall be fined * * *; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void."

2. ——: DELIVERY IN INSTALLMENTS: NON-PAYMENT: RESCISSION. Where coal was to be delivered in installments, each shipment to be paid for thirty days after delivery, the seller could not rescind the contract and refuse to deliver the rest of the coal, on the ground that the purchaser had failed to pay for the prior shipments as per agreement. (See cases cited).

——: FUTURE DELIVERY: FAILURE TO DELIVER: DAMAGES. Where there is a contract of sale for future delivery, and the purchase price is not paid in advance, the measure of damages for failure to deliver is the difference between the contract price and the market price at the time of delivery as fixed by the contract. (See cases cited).

ppeal from Linn District Court.—HON. J. H. PRESTON, Judge.

FILED, OCTOBER 20, 1888.

ACTION to recover $5,605.94, alleged to be the npaid part of the purchase price of coal, sold by the ssignor of plaintiff to defendants. The cause was tried) a jury, and a verdict and judgment rendered for efendants. The plaintiff appeals.

McNett & Tisdale and *Frank C. Hormel*, for ppellant.

Hayes & Schuyler and *Thompson & Lanning*, for ppellees.

ROBINSON, J.—On the twenty-eighth day of July, 886, the plaintiff's assignor, the Whitebreast Coal ompany, by a traveling salesman named Russell, ıtered into an agreement with the defendants for the ıle and delivery to them, on the cars in Chicago, of a nantity of coal. It is the claim of plaintiff that this greement required the coal company to ship during the .onths of August and September, to points to be desigated, one hundred and fifty cars of coal, but subject,) far as the time of shipment was concerned, to the ıstom and rules governing the hard-coal trade; and .so subject to the condition that the coal company ıould not be liable for delays and failure in shipment, hen such delays and failure were the result of causes eyond its control, such as its inability to procure transortation from the mines in Pennsylvania, or from hicago. Plaintiff further claims that the coal company otified defendants about August 11, 1886, that it would

become difficult, in a short time, to secure prompt shipments of coal, and requested liberal orders for coal for shipment in that month; that notwithstanding such request defendants ordered but sixteen cars during August; that, from the latter part of that month it was so difficult to obtain transportation that from that time to the end of the following December only eighty-six more cars of coal could be shipped to defendants; and that the total number of cars so shipped was one hundred and two. The defendants claim that their agreement with the coal company was verbal, but that Russell delivered a written memorandum thereof, as follows:

"30 cars No. 4, Scranton. $4 65 f. o. b. Chgo.
70 " Nut, $4 65 " "
45 " Stove, $4 65 " "
5 " Egg, $4 40 " "

"Shipped as ordered, Aug. & Sept.

"Privilege of 250 cars more. No larger proportion of No. 4 during Aug. & Sept. Terms, 30 days.

"WHITEBREAST COAL CO.
"S. G. RUSSELL, Sales Agent."

Defendants further claim that the agreement required the delivery to them of one hundred and fifty cars of Scranton coal, of the kinds and for the prices per ton named; and that it gave to them the privilege of ordering, during August and September, 1886, two hundred and fifty additional cars of the coal on the same terms; that they exercised this privilege, and ordered four hundred car-loads before the end of September; that the coal company failed to furnish two hundred and ninety of the car-loads so ordered; that by the custom of trade, and as understood by the parties, a car-load was to contain at least fifteen tons; that after the agreement was made the price of coal advanced to $6.25 per ton; and that defendants sustained damage, by reason of the failure of the coal company to fill their orders, to the amount of $6,860. They demand that this amount be treated as a counter-claim to any demand held by plaintiff, and admit that he is the assignee of the coal company. The plaintiff denies that a privilege was given to defendants to order two

hundred and fifty additional car-loads, and alleges Russell had no authority to give such a privilege; if given, it was within the statute of frauds, and that it was without consideration; that it wa indefinite and uncertain to have binding force; tl never became valid because of a mistake of the p to it; that if given it was a contract entered into a be executed within the state of Illinois, and is gov by the laws of that state; that it was in violation o laws, and therefore void. Demurrers to portions reply were sustained.

I. The first question presented for our consi tion is the validity of the alleged agreement, so it gave to defendants the privile ordering two hundred and fifty car- of coal in addition to the one hundrec fifty first provided for. The answer a the agreement in the following te

1. Sale: severable contract: gambling: statute of Illinois: place of performance.

"That on or about the twenty-eighth day of July, 1886, the said defendants made and entered into bal contract with the said Whitebreast Coal Com for the purchase of one hundred and fifty car-los Scranton coal, to-wit: Thirty car-loads No. 4, at per ton; seventy car-loads nut, at $4.65 per ton; five car-loads stove, at $4.65 per ton; five car-loads at $4.40 per ton,—to be shipped as ordered in A and September, at thirty days' time; with the priv upon the part of said defendants, of so ordering, the same terms, two hundred and fifty cars more o coal, with no greater proportion of No. 4 than mentioned." The plaintiff alleged in his reply th the time of making this agreement, there exist Illinois a statute as follows: "Whoever contrac have or to give to himself or another the option to s buy, at a future time, any grain or any other co dity, stock of any railroad or any other company, be fined not less than ten dollars, nor more tha thousand dollars, or confined in the county jai exceeding one year, or both; and all contracts ma violation of this section shall be considered gam

contracts, and shall be void." Plaintiff also alleges that the contract was made in Illinois, and was and is an Illinois contract, governed by the laws of that state; and that it is in violation of the provision quoted. A demurrer to this portion of the reply was sustained. It is claimed by appellee that the statute in question was meant to cover gambling contracts, where no actual delivery is contemplated; that the contract in this case was not an option to buy at a future time, but was a present purchase, with an option to increase the quantity of coal to be actually taken; that the pleadings show that the coal was not to be delivered within the state of Illinois, but outside thereof; that the statute does not change the common law as to validity of contracts, but puts a criminal penalty to contracts that are and were void at common law; that to make the contract in this case void, and subject to the statutory penalty, it must appear that it was mutually intended that no delivery should be made, but that a settlement should be had on a gambling basis, according to change in the market price of coal.

The claim that the contract was not to be performed within the state of Illinois is not sustained by the pleadings. They show that the duty of the coal company ended with the delivery of the coal free of charge on board the cars in Chicago; nor is the claim that the Illinois statute does not make contracts to which it applies void, well founded. The admitted language of the statute is that all contracts made in violation of it "shall be considered gambling contracts, and shall be void." The question for us to determine is whether the agreement in question falls within the provisions of the statute. It is claimed by appellant that the transaction between the coal company and defendants was virtually two contracts—one of which was legal, and the other illegal; while appellees claim that there was but one agreement, and that, since that contemplated an actual sale and delivery of at least one hundred and fifty carloads of coal, it must be held valid in all its provisions. If there was in fact but a single contract, a part of which

as valid, the effect claimed by appellees would
sult. If the contract is not separable, and is ill
part, then it is invalid as an entirety, and cannc
nforced. *Dillon v. Allen*, 46 Iowa, 300; *Casad*
Woodbury County, 13 Iowa, 116; 2 Pars. Cont.
etc. Cont. 221, 246.

But we think the contract is separable. It is
at "if the part to be performed by one party con
several distinct and separate items, and the pric
paid by the other is apportioned to each item t
erformed, or is left to be implied by law, such a
act will generally be held to be severable; and
me rule holds where the price to be paid is cle
nd distinctly apportioned to different parts of wh
be performed, although the latter is in its na
ngle and entire." 2 Pars. Cont. 517. It is sai
etc. Cont. 246, "that, if one of two considerations
promise be void merely, the other will support
romise; but that, if one of two considerations
nlawful, the promise is void. When, however,
legality of a contract is in the act to be done, and
the consideration, the law is different. If, for a l
nsideration, a party undertakes to do two or r
cts, and part of them are unlawful, the contrac
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Whenever the unlawful part of a contract can be
rated from the rest, it will be rejected, and
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as to be paid on each shipment, thirty days aft
as made, and the price was affixed to each ton of
ence there was no difficulty in separating the part
he contract, and no injustice would result in so do

But the agreement must of necessity be
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two parts—one of which was in effect a
act of purchase, and the other a contract
he privilege of purchasing. We shall there
reat so much of the contract as relates to the two
red and fifty car-loads of coal as separate and dis
om the remainder. Thus considered, there can b

question that it is a contract to give to defendants the right to buy coal at a future time. But it is said that this right is not an "option," within the meaning of the statute, and that the statute "was passed to curb the gambling transactions of boards of trade in large cities, and to reach such contracts there made, and made in similar ways, and was never intended to reach contracts like the one in suit, when, upon an actual sale, a privilege, based upon the same transaction and consideration, was given to take more of the sold article upon the same terms." We have no guide to the legislative intent in this case, excepting the language of the statute. That gives no color to the claim that its application is not to be as broad as its terms. It is true, the word "option" is not defined in the statute; but the pleadings do not show that it was used with reference to any local definition or usage. The supreme court of Illinois has defined the word as used in the statute in a number of cases. It has said that "the true idea of an option is what are called in the peculiar language of the dealers 'puts' and 'calls.' A 'put' is defined to be the privilege of delivering or not delivering the thing sold, and a 'call' is defined to be the privilege of calling for or not calling for the thing bought. 'Optional contracts,' in this sense, are usually settled by adjusting market values, as the party having the option may elect. It is simply a mode adopted of speculating in difference in market values of grain or other commodities. It must have been in this sense that the term 'option' is used in the statute. Such a contract is obviously fictitious, having none of the elements of good faith, as in a contract where both parties are bound, and is defined by statute as a gambling contract. Fictitious purchases or sales, such as were in the contemplation of the parties, were as nothing; and it is a matter of no consequence where it is pretended they were made, whether on the board of trade or elsewhere." *Pearce v. Foote*, 113 Ill. 228; citing *Pixley v. Boynton*, 79 Ill. 351. In *Tenney v. Foote*, 4 Bradw. 594, approved, on appeal, 95 Ill. 99, the court said: "The word 'option,' as used in the statute here, taken with the

context, means a mere choice, right or privileg
or buying; and it is the contracting for su
right or privilege of selling or buying, at a fu
any commodity, that the statute was intend
hibit, as contradistinguished from an actual s
chase with the intention of delivering and acc
commodity specified." The case of *White*
123 U. S. 392, 8 Sup. Ct. Rep. 221, is cited by
ties to this appeal. In so far as it construes t
under consideration, it is in harmony with th
quoted. By implication, it approved an inst
the trial court which stated that "the statute
against what are called 'puts' and 'calls;' th
right or the privilege which a party may have
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to sell, but where one man pays another five c
lars for the privilege of delivering to him one
or five thousand or ten thousand bushels of
future time, or pays him a similar amount fo
ilege of buying or accepting from him grain a
time; a contract which cannot be enforced
because it is wholly at the option of the part
the option whether he will call for the grain or
is what is termed a 'gambling contract,' or
'call,' or an option to buy or sell at a fu
within the meaning of the Illinois statute."

Many cases have been cited by couns
involve the principle that, "when the parties
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shall be no delivery thereof, but that the t
shall be settled by the payment of the differen
the contract price and the market price of the c
at the time fixed, the contract is void." *First*
Bank of Lyons v. Oskaloosa Packing Co., 6
But such cases are not directly in point. In
bar the intent of the parties at the time the
was entered into does not appear. So far as
ings show, the defendants may at all times hav
to demand the sale to them of the two hundre
cars of coal. Under the contract and th

pleaded, the intent with which defendants entered into the contract does not seem to us to be material. It was nothing which the coal company could enforce. There was nothing in the contract to prevent defendants from changing their intent at pleasure. In the absence of legal or moral obligation, people usually do those things which they think will result in benefit, and avoid doing those which would result in loss. Therefore it must have been understood by both parties to the contract, when it was made, that defendants would not claim the privilege which it attempted to give, unless it should prove to be for their financial interest to do so. If the price of coal advanced after the contract was made, the defendants would insist on the privilege, and if the price declined the privilege would be abandoned. Conceding that the consideration of the optional part of the contract is found in the obligation of defendants to purchase one hundred and fifty car-loads of coal, yet it is clear that the option was designed for the benefit of defendants, and to secure to them the privilege of speculating on the changes in the market. In our opinion, such a transaction is as much a gambling contract, within the meaning of the Illinois statute, as though the parties to it had intended that no coal should be delivered, but that the coal company should pay to defendants the difference in their favor between the contract price and the market price at the date named for delivery. We therefore conclude that the demurrer which we have been considering should have been overruled.

II. The plaintiff alleged in his petition that the coal company was released from all obligation to ship more cars of coal than it did, for the reason that defendants failed to pay for the coal shipped within the time and in the manner provided by the contract. He now complains of rulings of the court which excluded evidence offered to sustain that issue. We discover no error in these rulings. The agreement provided for the payment for each shipment thirty days after it was made. The alleged breach did not go to the whole consideration of

2. ——: delivery in installments: nonpayment: rescission.

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Wheeler, 65 Iowa, 395.

III. The court belo
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Folsom, 2 Iowa, 110; *Je*
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—: future delivery: failure to deliver: damages.

IV. In view of the
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THE McCORMICK HARV
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Attachment: WRONGFUL SU
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Phillips, 87 Iowa, 428).

Appeal from Pottawat
GEORGE

FILED, O

PLAINTIFF brought
ınd sued out a writ of at
he execution of the note
vas due thereon, and p

attachment bond, on which he recovered. Plaintiff appeals.

Fremont Benjamin, for appellant.

I. L. Statzell and *E. A. Babcock*, for appellee.

REED, J.—The grounds alleged for the issuance of the attachment were that defendant had disposed of his property with intent to defraud his creditors; that he was about to dispose of his property with such intent, and that he had property or rights of action which he concealed. The district court instructed the jury in effect that the allegation that the writ was wrongfully sued out would be established by proof that plaintiff had no reasonable ground to believe that the alleged grounds for attachment were true. The instructions are erroneous, and may have been prejudicial. If the alleged ground for attachment is true in fact, the suing out of the writ is not wrongful, even though the party making the allegation had no knowledge of its truth. *Vorse v. Phillips*, 37 Iowa, 428. The burden of proof is on the one alleging the wrongfulness of the act of suing out of the writ, and to establish his allegation he must prove not only that the party who caused it to be issued had no reasonable ground for believing that the allegations upon which it was issued were true, but that they were not true in fact. Under the instructions in question defendant was allowed to recover on proof of but one of these states of fact.

Other rulings on the trial are assigned as error. Some of the questions argued relate merely to the conduct of the trial, and will hardly occur in another trial. As to the other assignments, we deem it sufficient to say that the rulings complained of could not have been prejudicial even if erroneous. For the error pointed out the judgment will be

REVERSED.

HE MINNESOTA STONEWARE CO. v. KNAPP & CO

: RECOVERY ON COUNTER-CLAIM: APPORTIONMENT: PRESUMPTION
APPEAL. It appears from the certificate of the trial judge in
is case that the amount of plaintiff's demand was reduced by a
nding for defendants upon a counter-claim pleaded by them.
eld that in such case an apportionment of the costs was proper;
d though the amount taxed to plaintiff would seem to be exces-
ve, yet, since the facts in the case, as known to the court, may
ve been such as to justify the apportionment, this court must
esume that the facts were such, and that the order was right.

eal from Black Hawk District Court.—HON. C. F. COUCH, Judge.

FILED, OCTOBER 20, 1888.

ACTION to recover for stoneware sold and delivered
fendants by the plaintiff. There was a trial to a
and a judgment upon a verdict for plaintiff. Upon
on of defendants the costs were apportioned, and
ourth of them was taxed to plaintiff on the ground
the contest was wholly upon the counter-claim, in
h defendants were successful. Plaintiff appeals.

Hemenway & Grundy, for appellant.

I. J. Tolerton, for appellees.

BECK, J.—I. The amount in controversy in the
being less than one hundred dollars, it is sent here
a certificate in the following language: "I, C. F.
h, judge of said court, do hereby certify that upon
hearing and disposition of this cause a question of
arose upon which it is desirable to have the opinion
he supreme court, to-wit: The plaintiff brought
for $746.45, with interest from June 1, 1885, upon a
ract for sale and delivery of certain stoneware, for a

balance due. The defendants pleaded that by the contract of sale plaintiff warranted the ware to be of a certain quality; that it agreed to deduct the value of all pieces of ware broken in transit, and that it agreed to pay the freight on the ware from Red Wing, Minn., to Cedar Falls, Iowa; that in fact the ware was not of the quality warranted,—whereby defendants were damaged $274.15; that defendants had not received sufficient credit for broken ware by the sum of $9.22, and that defendants had not received sufficient credit for freight paid by the sum of $35.27. These allegations were denied. The evidence upon these issues of fact was conflicting, and the jury found a verdict for plaintiff for $770.23, which was a reduction from the demand of plaintiff by the sum of seventy-seven dollars. Defendants moved to divide the costs in the action, for the reason that the contest was wholly on the counter-claim of defendants and they were successful thereon. The court sustained the motion, and taxed one-fourth the costs of witnesses, jury, and reporter's fees to the plaintiff. The question arises upon the correctness of this ruling of the court in sustaining the motion and making division of the costs."

II. We are required to determine the case upon the certificate. It quite plainly appears that the certificate does not entirely accord with the facts disclosed by the abstract of the pleadings and judgment. But as no question based upon this disagreement is raised, it is an immaterial matter. The certificate shows that defendants claimed a deduction from the sum due plaintiff on account of breakage and freight paid, amounting to $44.49, more or less,—more than the sum credited thereon. The claim for these deductions probably cannot be regarded as a counter-claim, but rather as a defense of a different character. But defendants did plead a counter-claim based upon the breach of a warranty, and the certificate shows that plaintiff did not recover the amount of his claim by seventy-seven dollars. The defendants must have recovered $32.51 at least on the counter-claim. Counsel for plaintiff admit

if defendants recovered upon their counter-claim osts were properly apportionable. But they deny there was such a recovery. We think the correct- of our conclusion that there must have been a very on the counter-claim cannot be doubted. The ficate will admit of no different conclusion.

III. It is not to be denied that upon this conclusion the facts the amount of costs taxed to plaintiff ars excessive. But we are not permitted to presume in the rulings of the district court, or to presume which will raise a presumption of error, but will r presume a state of facts supporting the correct- of the court's rulings. The district court may have d, or may have been informed in some proper way, the defendants recovered upon their counter-claim n greater than the minimum sum which we have e stated must have been found due upon the ter-claim. The district court had all the facts e it, which we do not have. We cannot exercise presumption that the costs were taxed in the abuse e court's discretion. But on the other hand we exercise the presumption, in the absence of an native showing of error, that the order for the tax- of costs is authorized by the facts. The judgment e district court is AFFIRMED.

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98 290
99 421
100 899

ALEN v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

nstructions: STATING ISSUES. In stating plaintiff's claim to the ury the court omitted one of the issues raised in the petition. But nce there was no evidence to sustain such issue, *held* that it was roperly omitted.

ailroads: INJURY TO BRAKEMAN: "WIPER" IN CHARGE OF ENGINE. Where a "wiper" has temporary charge of an engine in making p a train, the company is liable for his negligence resulting in jury to a brakeman in coupling cars.

3. ——: ——: UNWARRANTED PROCEDURE: BURDEN OF PROOF. In an action for injury to a car-coupler, where the brakemen were in their proper places, and the usual signals given, and efforts made to couple the cars together, if the claim is made in defense that the train was being operated by unauthorized persons, or at an improper time, the burden is on defendant to prove it.

4. ——: ——: NEGLIGENCE: QUESTIONS FOR JURY. There being evidence, in such case, tending to show that the person in charge of the engine, when the cars were a proper distance apart to attempt to couple them, threw them together violently, the question of his negligence was properly submitted to the jury, as was also the question of plaintiff's contributory negligence in attempting to make the coupling with mittens on his hands; and their verdict cannot be set aside on appeal for want of evidence.

5. **Instructions**: SPECIAL INTERROGATORIES: WHEN NOT PROPER. Under section 2808 of the Code, which provides that special interrogatories may be submitted to the jury, and that the jury may be required to find upon any particular questions of fact, such fact or facts must be material and pertinent to the matter in controversy, and the interrogatories must seek a response as to the existence of some particular fact, and not embrace a series of facts which are necessarily included in, and determined by the general verdict. (For illustration and application of rule, see opinion).

6. **Railroads**: INJURY TO BRAKEMAN: AMOUNT OF VERDICT. A verdict for twenty-three hundred dollars for an injury to a brakeman twenty-three years old, whereby he lost his right thumb and had his next two fingers permanently injured and stiffened, and his arm weakened, *held*, on appeal, not to be excessive.

Appeal from Louisa District Court.—HON. J. K. JOHNSON, Judge.

FILED, OCTOBER 20, 1888.

PLAINTIFF was a brakeman in the employ of the defendant, and brought this action to recover damages for an injury received because of the negligence of the defendant when he was attempting to make a coupling. Trial by jury, verdict for the plaintiff, and judgment. The defendant appeals.

E. E. Cook and *E. W. Tatlock*, for appellant.

R. Caldwell and *A. Sprague*, for appellee.

SEEVERS, C. J.—The ground of negligence stated in substituted petition upon which the plaintiff bases right to recover is "the gross carelessness of the per- who was in charge of the engine, and the brakeman was on top of the car; that, as the cars were being ked up, plaintiff signaled the person who was in ge of the engine to slow up; and when the car approaching the car to which it was to be coupled, was within five or six feet of the stationary car, ntiff stepped forward to adjust the coupling, when brakeman on the train signaled the person who had ge of the engine to back up, when the car was wn violently back, thus catching and crushing ntiff's hand; that the engineer was not at his post, that the person who had charge of the engine was "wiper."

I. The court, in stating the issues to the jury, ed the plaintiff's claims as follows: "That while plaintiff was about to couple some cars attached to an engine to some stationary , and after the plaintiff had given the person in ge of the engine a signal to "slow up," another eman of defendant gave such engineer or person in ge of the engine a signal to "back up," and there- n such person in charge of the engine negligently, without warning to plaintiff, backed the engine with attached thereto so as to catch and crush or re the hand of the plaintiff; * * * that, in so g, the person in charge of the engine was guilty of igence."

INSTRUCTIONS: stating issues.

It will be observed that the only question submitted ne jury was whether the person in charge of the ne was guilty of negligence, and the court did not n so doing. It is true, it is stated in the petition the injury was caused by the negligence of such on and the brakeman, but as there was no evidence ing to show that the brakeman was negligent, the t rightly withdrew such issue from the jury. There no evidence tending to show that the brakeman was

negligent in giving the signal at the time or in the manner he did. We deem it proper to say that an amendment to the substituted petition in no manner changes the allegations of the latter as to the grounds of negligence or as to the person who was guilty thereof. We think the court fairly and sufficiently stated the issues to the jury.

II. It is said that there is no evidence tending to show that the person in charge of the engine was not a volunteer, and therefore the defendant is not responsible for what he did. He is designated as the "wiper" in charge of the engine. He was an employe of the defendant, and was running or operating it on the defendant's road when attached to a train or part of a train of cars; and if, by his "mismanagement," the plaintiff was injured, the defendant is clearly liable. The statute so provides. Code, sec. 1307. In no sense was he a volunteer. At most he was performing the duties of another employe. It is also said in this connection that there was no evidence tending to show that the train was being made up at the usual and regular time. This is immaterial. The train was being operated on defendant's road. But we think there was such evidence. The brakemen were in their proper places, and the usual signals given, and efforts made to couple the cars together. Under such circumstances, if the train was being operated by persons who had no authority to act, or at an improper time, the burden was on the defendant to so show.

2. RAILROADS: injury to brakeman: "wiper" in charge of engine.

3. —: —: unwarranted procedure: burden of proof.

III. It is also said that there is no evidence tending to show negligence, and reliance is placed in part on the matters we have discussed. In addition thereto, it is said that there is no evidence tending to show that there was any negligence on the part of the person in charge of the engine. In considering this question it will be conceded that the signal given him to "back up" was entirely proper, and he did right in obeying it; but if,

4. —: —: negligence: questions for jury.

in so doing, he recklessly or negligently caused
to be thrown together with unnecessary violenc
he may have been guilty of negligence. There
dence tending to show that when the engine was
ing up" the plaintiff gave a signal to "stop,"
engine "slowed up;" and when the cars were
distance apart the plaintiff attempted to make th
ling, when the person in charge of the engine ga
"kick," which caused the cars to come
together, and the plaintiff's hand was caught
the cars, and was injured. It was, we think
jury to say whether the cars came together wit
ual and unnecessary violence, and whether the p
charge of the engine was guilty of negligenc
tainly we cannot, as a matter of law, determine
the cars were thrown together with too much viol
not; and it may be the jury should have foun
wise; but clearly, in our judgment, there is
upon which the verdict can with propriety be su
and this is true as to the question of contributor
gence. We cannot say that the plaintiff was g
such negligence. In fact, we think he was not
possibly, in attempting to make the coupling w
tens on his hands. But a proper instruction wa
on this subject, and the jury found otherwise.

IV. The defendant asked that twenty-seve
rrogatories be submitted to the jury. Si
them were submitted and answered
jury, and counsel for the defendan
that the court erred in refusing t
the others. Special complaint is
refusal to submit the second, third, fourt
th, twentieth and twenty-fifth interro
nber three is as follows: "Do you find from
ce that the accident to the plaintiff was in
art caused by any act of his own, either of
or omission?" This interrogatory is too
specific fact is called for, unless it can be s
contributory negligence of the plaintiff is
. The general verdict is a complete and

TRUC-
NS: special
rrogato-
: when not
per.

response to this interrogatory; and the second, in legal effect, is precisely like it. The fifth and eighth interrogatories, in substance, are whether the person on the engine was the servant or employe of the defendant, and whether he was engaged in the line of his employment. That he was an employe, and in charge of the engine, and was running it; that is, he was acting in the capacity of engineer,—is not denied. But the defendant insists that there is no evidence which shows that he was acting within the line of his employment, or which expressly shows any consent on the part of the defendant that he was so acting. What we have heretofore said sufficiently indicates that, in our opinion, this was immaterial under the circumstances. The jury are asked in the twentieth and twenty-fifth interrogatories to say how much they allow as actual damages, and how much for the plaintiff's incapacity to work in the future, and for what length of time. We deem it sufficient to say that these interrogatories are immaterial. No specific fact is called for, and answers thereto could not possibly in any manner impair the force and effect of the general verdict. The remaining interrogatory, number four, in substance and legal effect, is like numbers two and three. For the reasons stated, the court did not err in refusing to submit any more special interrogatories than it did. The Code provides that special interrogatories may be submitted to the jury, and the jury may be required to find "upon any particular questions of fact." Code, sec. 2808. Of course, such fact or facts must be material and pertinent to the matter in controversy, and the interrogatories must ask a response as to the existence of some particular fact, and not embrace a series of facts which are necessarily included in and determined by the general verdict.

V. The instructions are criticised by counsel, and said to be erroneous, and that instructions asked and refused should have been given. We deem it sufficient to say that we think the instructions given are full, fair, and in every respect unobjectionable. They cover the

6. RAILROADS: injury to brakeman: amount of verdict.

whole ground, and therefore the instructions asked were properly refused. It is also said that the verdict is contrary to the instructions, but we are unable to concur in this proposition. We think it was for the jury to say whether the plaintiff had sufficient time to withdraw his hand after the speed of the cars was increased, and after he was aware of, or with reasonable diligence ought to have known, such fact. The verdict is for twenty-three hundred dollars, of which amount three hundred and twenty dollars was for loss of time, and the residue must have been for pain, suffering and inability to earn as much in the future as before the accident; and it is urged that the verdict is excessive. There was evidence tending to show that the plaintiff was twenty-three years old at the time of the trial. Because of the injury the thumb of the right hand was amputated, the two fingers next to it were injured, and the evidence tended to show that such injury was of a permanent character. At the trial they were crooked, and the plaintiff was unable to do the same work he previously did. Nor was his arm as strong. He was not able to work for eight months after the accident. He was earning forty dollars a month at the time of the accident. At the time of trial he was working as a section-hand, and earning $1.10 a day. We are unable to say, under such circumstances, that the verdict is excessive.

AFFIRMED.

ELLISON v. SMYTH *et al.*

Mortgage: WASTE: INJUNCTION. This action was brought to enjoin the cutting of timber on the mortgaged premises, and a temporary injunction was allowed, but the final hearing was not had until after the premises had been bid in by the mortgagee, at foreclosure sale, for the full amount of his demand and costs; but the year for redemption had not expired. The injunction was dissolved and the petition dismissed. *Held* that this was right, because there was no ground for the action in the first place; it appearing that defendants had then ceased cutting timber, with no apparent intention of resuming; and that the cutting already done had been done under an agreement with plaintiff, which provided for the payment of the proceeds upon the mortgage debt, no intention to violate which agreement was shown; and the fact, which appeared at the final hearing, that they did not so apply the proceeds of the timber, was then immaterial, since plaintiff had bought in the premises for the full amount of the debt and costs.

Appeal from Louisa District Court. — HON. J. H. PRESTON, Judge.

FILED, OCTOBER 22, 1888.

ON the fifth day of May, 1882, James Smyth, now deceased, executed to the appellant his promissory note for nine thousand dollars, with annual interest at eight per cent. At the same time said deceased, with his wife, Elizabeth Smyth, one of the defendants, executed to plaintiff to secure the note, a mortgage on the farm on which the deceased resided, and upon eighty acres of timber-land some distance from the farm. After the death of James Smyth the appellees, his widow and heirs, continued to reside on the farm, and were in the possession of all the mortgaged real estate. In the winter of 1885–86, the defendants cut a large amount of timber upon the eighty acres of timber-land, and also upon the farm. The interest on the mortgage was in arrears. In July, 1886, the plaintiff commenced this action to enjoin the defendants from cutting any more timber, and from removing that already cut. An

injunction was allowed, and afterwards it was, upon application of defendants, modified so as to allow the defendants to sell and dispose of the timber which had been cut, and pay the proceeds to the plaintiff, to apply on the mortgage debt. The injunction was continued so far as the further cutting of timber was involved. The plaintiff commenced an action to foreclose the mortgage. The mortgage was not due, but it contained a provision authorizing a foreclosure upon default in the payment of interest, and after sixty days' notice by the mortgagee. For some reason not material to this inquiry the action for foreclosure was dismissed. Another action was brought, and a decree of foreclosure was obtained; and in July, 1887, all of the mortgaged property was sold on special execution, for the full amount of the mortgage, including interest and costs. This action for injunction was not tried in the district court until in the month of November, 1887, and the period of redemption from the foreclosure sale expired on the second day of July, 1888. The trial of this cause upon the merits resulted in a decree dismissing the petition and dissolving the injunction, and the plaintiff appeals. Upon the death of Samuel Ellison, Mary Ellison was substituted as administratrix.

Chas. A. Clark, for appellant.

C. W. Kepler, for appellee.

ROTHROCK, J.—No appeal was taken from the order modifying the temporary injunction. As modified, the defendants were enjoined from cutting any more timber, and they were permitted to prepare that already cut for market, and sell it; and, after deducting the expenses, pay the net proceeds upon the mortgage. At the preliminary hearing, which was upon affidavits, the court found the timber was cut with the knowledge and consent of the plaintiff, and with the understanding between the parties that the net proceeds of the sale of the same should be paid on plaintiff's mortgage. The same questions of fact were in issue and tried upon the

final hearing from which this appeal was taken. A careful examination of the evidence has led us to the conclusion that the injunction was rightfully dissolved, upon the grounds that it appears, from a fair preponderance of the evidence, that the timber was cut under the agreement and understanding above mentioned; and there is nothing in the evidence to show that the defendants intended to apply the net proceeds to any other purpose than in payment of the mortgage. No timber had been cut for several months prior to the commencement of this action, and it does not appear that the defendants had any purpose or intention to cut any more. It appears to us that there was no cause for an injunction when it was issued, and there is nothing in the record, as it is presented to us, upon which the court could properly have found that the injunction should be continued until the period for redemption from the foreclosure sale expired. There was a large number of witnesses examined upon the hearing, upon the question as to the value of the land. The object of this testimony was to show on the part of the plaintiff that the committing of waste by cutting timber was an impairment of the mortgage security; and the defendants sought to show that the value of the land was so much greater than the amount of the mortgage that the plaintiff had no cause for commencing the action. It is unnecessary to determine this issue. We place our affirmance of the decree upon the ground that the cutting of timber was done with the knowledge and consent of the plaintiff; and there is nothing to show that the defendants did not in good faith intend to carry out the agreement. They even offered, before this suit was commenced, to saw such of the timber as was suitable into railroad ties, and deliver them to the railroad company in plaintiff's name, and to give him security for the application of the proceeds of all the timber and wood in payments on the mortgage. It is true the defendants did not apply any of the proceeds upon the mortgage. But the plaintiff has now no ground of complaint of their failure to do so. When this cause was

tried there was nothing due on the mortgage. The land sold for sufficient to pay it in full, with interest and the cost of foreclosure. The decree of the district court will be AFFIRMED.

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WEYAND v. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

1. **Jurisdiction**: OF FOREIGN CORPORATION: ACTION AIDED BY ATTACHMENT: FORMER ADJUDICATION. Under section 2580 of the Code, an action against a foreign corporation may be maintained in the courts of this state when it is aided by attachment against the property of such corporation found within this state; and a judgment of a federal court in this state, dismissing a former action based on the same cause, but not aided by attachment, on the ground that it had no jurisdiction of the defendant, is no bar to the subsequent action aided by attachment.

2. **Carriers**: OF GOODS: DELIVERY TO HOLDER OF UNASSIGNED BILL OF LADING: LIABILITY. A company, shipping goods upon the order of E., marked and consigned them to itself at P., the place where E. lived. It took two bills of lading for the goods, which were in fact duplicates, but neither showed that another had been issued. It then drew a draft on E., through a bank at P., for the price of the goods, and sent with it to the bank an order on defendant to deliver the goods to E., with directions to the bank to deliver the order to E. upon the payment by him of the draft. At the same time it sent one of the bills of lading to E., instructing him that the goods had been shipped, and that he was to pay the draft and obtain the order. The bill of lading sent to E. showed the consigning company to be the consignee, and it was not indorsed or assigned by that company. Upon presentation of this bill of lading the defendant railway company delivered the goods to E., who was at the time insolvent, and who never paid for the goods. *Held* that such delivery was without warrant, and that the defendant company was liable to the consigning company for the value of the goods, though it was ignorant of E.'s insolvency, and that the goods had not been paid for, and that a draft and order had been sent and instructions given in regard to the goods. (See opinion for a discussion of the question upon the authorities, by ROBINSON, J.)

——: ——: ——: CUSTOM. In such case it was no defense that there was a local custom at P. to deliver goods to the person who held the bill of lading, such custom not being general, and the consigning company having no knowledge of it when the goods were shipped.

Appeal from Cedar Rapids Superior Court.—HON. J. T. STONEMAN, Judge.

FILED, OCTOBER 22, 1888.

THIS is an action aided by attachment, brought to recover the value of a quantity of canned goods, shipped by the Elgin, Iowa, Canning Company to Pueblo, Colorado, and alleged to have been delivered to a person not entitled to receive the same, through the fault of defendant. The cause was tried to the court, and a judgment rendered in favor of plaintiff for the amount admitted to be the value of the goods in controversy, and sustaining the attachment. Defendant appeals. On the first submission of this cause a decision was rendered by this court reversing the judgment of the superior court. A rehearing was ordered on the petition of appellee, and the cause again submitted.

George R. Peck and *Anderson, Davis & Hagerman*, for appellant.

Henry Rickel, for appellee.

ROBINSON, J.—Plaintiff is the trustee of the Elgin, Iowa, Canning Company. Defendant is a corporation organized and existing under the laws of the state of Kansas, and engaged in operating a line of railway from Kansas City through the states of Kansas and Colorado, and to the city of Pueblo, in the last-named state. At the time this cause was tried in the court below defendant had never owned nor operated any railway within the state of Iowa. In October, 1884, one Evans, of Pueblo, ordered of the canning company the goods in controversy. Not being acquainted with Evans, and not wishing to sell the goods on credit, it delivered them, marked and consigned to itself at Pueblo, to a railway company at Elgin, Iowa. From that company the canning company took two receipts or bills of lading, which were in fact duplicates, but neither showed

that another had been issued. The canning company drew a draft on Evans, through a bank in Pueblo, for the price of the goods, and sent to the bank an order on defendant to deliver the goods to Evans. The draft and order were sent together to the bank, with instructions to deliver the order to Evans upon payment by him of the draft. At the same time the canning company sent to Evans one of the bills of lading, instructing him that the goods had been shipped, and that he was to pay the draft and obtain the order. The bill of lading sent to Evans was not signed nor indorsed by the canning company. In due time the goods were transferred by the railway company which first received them to defendant, and were by it transferred to Pueblo. Evans never paid the draft nor obtained the order, but within twenty-four hours after the arrival of the goods in Pueblo, he presented the bill of lading which he had received to defendant, and without other authority obtained the goods. At that time Evans was insolvent, but defendant had no knowledge of that fact, nor that the goods had not been paid for, nor that a draft and order had been sent or instructions given in regard to the goods, but delivered them in good faith. The canning company commenced an action to recover of defendant the value of the goods in question, which was transferred to the circuit court of the United States for the northern district of Iowa. The answer in that case alleged that defendant was a corporation organized and existing under the laws of Kansas for the purpose of operating a line of railway, but was not organized for the purpose of nor engaged in operating a railway within this state; that no part of the road of defendant was or had ever been operated in this state, and that the claim of plaintiff did not grow out of, and was not in any manner connected with, any office or agency of defendant in this state. A demurrer to that answer was overruled, and, in consequence, the canning company dismissed its action. It afterwards appointed plaintiff, who is a citizen of Kansas, its trustee to collect the claim in suit. This action was commenced, and the Burlington, Cedar

Rapids & Northern Railway Company, a corporation doing business and with its principal office in Linn county, was garnished by virtue of the attachment process. The answer of the garnishee showed that it had in its possession when garnished the sum of fifteen hundred dollars which belonged to defendant.

I. Appellant insists that the superior court had no jurisdiction in this cause, for reasons set out in its answer in the action which was transferred to the federal court, and that the question of jurisdiction of the claim in suit was finally adjudicated in that action. The opinion of the federal court is found in 24 Fed. Rep. 866. We do not regard the decision of that court as conclusive of the right of plaintiff to maintain this action, even though it be conceded to have the force and effect of a final adjudication. It was based upon the facts as they existed in that case. It did not pass upon the right of the canning company to recover of defendant excepting in that action, "under the facts disclosed in the record" therein. One vital fact was that no attachment of property of defendant was disclosed. The defendant at the time this action was commenced had never owned nor operated a line of railway in this state, nor had it ever had therein any office or agency out of which plaintiff's cause of action grew. Therefore, neither of sections 2582 and 2585 has any application to the case. The defendant was not found within this state and had no residence therein; hence section 2586 of the Code does not apply. Section 2580 provides as follows: "An action, when aided by attachment, may be brought in any county of the state wherever any part of the property sought to be attached may be found when the defendant, whose property is thus pursued, is a non-resident of this state." The legal home of defendant is in the state of Kansas. *Ex parte Schollenberger*, 96 U. S. 369. It is a non-resident of this state, and, having property in Linn county when this action was commenced, falls within the provision quoted.

1. JURISDICTION: of foreign corporation: action aided by attachment: former adjudication.

delivering the goods to Evans, for the reason that the delivery to him of the bill of lading was in effect an assignment of the goods, and invested him with a right to demand and receive them. We are referred to many authorities which are claimed to support this view. One of these is *Merchants' Bank v. Union Ry. & Trans. Co.*, 69 N. Y. 374. An examination of that case and of the cases therein cited will show that what the court really decided was that a delivery of the forwarder's receipt without assignment, but with intent that the title to the goods for which it was given, or an interest therein, should be thereby transferred, would be effectual to accomplish the transfer intended. Other authorities cited by appellant are to the same effect. In this case it was the intention of the canning company to retain the title and right of possession in itself until the price of the goods should be paid. The bill of lading required the delivery of the goods to the consignor. It did not provide for delivery to bearer or order, but to the Elgin Canning Company. Therefore it is clear that the forwarding of the bill of lading to Evans, with directions to pay the draft and obtain the order for the goods, did not invest him with any right to the goods as against the consignor. But it is said that defendant was justified in delivering the goods to Evans because of his possession of the bill of lading. The cases of *Lickbarrow v. Mason*, 1 Smith, Lead. Cas. *838, with annotations; *Dows v. Green*, 24 N. Y. 638; *Allen v. Williams*, 12 Pick. 297, and others, are cited in support of this claim. It is true that statements were made in some, if not all, of those cases which, considered apart from the connection in which they are found, might seem to sustain the claim; but when they are considered in connection with the facts of the cases where found, and the general conclusions of the court which made them, we think they go no further than to hold that the delivery of an unindorsed bill of lading would be a good symbolical delivery of the goods it represented, where such was the intent and purpose of the parties. In *Fearon v. Bowers*,

2. CARRIERS: of goods: delivery to holder of unassigned bill of lading: liability.

reported in 1 Smith, Lead. Cas. *782, cited by appellant, the consignor had sent two bills of lading, one of which was indorsed to one person and the other to another, and the court held that a delivery might be made to the holder of either bill. That case has but little relation to the principle involved in this. Appellant insists that the bill of lading is like a promissory note, in that possession is *prima-facie* evidence of ownership; but we do not think that such is the case. A bill of lading is a non-negotiable instrument. *Garden Grove Bank v. Humeston & S. Ry. Co.*, 67 Iowa, 534. The following language is pertinent: "Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. * * * They are in commerce a very different thing from bills of exchange and promissory notes, answering a different purpose and performing a different function." Also: "It is not a representative of money, used for transmission of money or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it, —a representative of those goods; but if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona-fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen." *Shaw v. Railroad Co.*, 101 U. S. 557. See, also, Hutch. Carr. sec. 348. In 2 Pars. Cont. 292, it is said: "The consignor frequently sends to a consignee a bill not indorsed, and then sends to his own agent in or within reach of the same port an indorsed bill,—it may be indorsed in blank, or to the agent, or to the party ordering the goods,—and the consignor sends to his agent with the bill orders to deliver the bill to the party ordering the goods, or to receive the goods and deliver them to him, provided payment be made or secured, or such other terms as the consignor prescribes are complied with. This course secures to the consignor, beyond all question, the right and power of retaining the goods until the price for them

is paid or secured to him." This is not only in point, but seems to be sound in principle. The fact that Evans presented the bill of lading in this case was not sufficient to overcome the presumption which the terms of the bill raised, that the consignor was the owner of the goods. That such is the presumption is well established. *Congar v. Galena U. Ry. Co.*, 17 Wis. 485; *Krulder v. Ellison*, 47 N. Y. 37; *Lawrence v. Minturn*, 17 How. 100; *Alderman v. Eastern Ry. Co.*, 115 Mass. 234. See, also, *Tuttle v. Becker*, 47 Iowa, 486; 1 Benj. Sales, secs. 577, 579; 2 Amer. & Eng. Cyclop. Law, 242, 243. The contract with the canning company required the defendant to deliver the goods to the consignor. The unindorsed bill of lading presented by Evans was evidence that the contract was still in force, and that the canning company was then the owner of the goods. The delivery to Evans was not authorized, and was made by defendant at its own risk. Hutch. Carr. secs. 129, 130, 344. But it is said that the canning company clothed Evans with the apparent right to demand the goods, and that, since "one of two innocent parties must suffer a loss from the wrong of another, the loss should fall upon the party who put it in the power of that other to perpetrate the wrong." This case does not fall within that rule, for, as we have seen, the possession of the bill of lading, without indorsement or other evidence of assignment, did not vest Evans with any apparent right to the property. The loss resulted from the negligence of defendant in not insisting upon proper evidence of an assignment before it surrendered the goods.

III. It is insisted by appellant that the delivery to Evans was made in accordance with the custom at Pueblo, and that the contract of shipment must have been made with reference to that custom. The superior court found that by a local custom at Pueblo goods shipped over railway lines to that place were delivered to the person who held the bills of lading, but that the custom was not general, and plaintiff had no knowledge of it. The contract of shipment required defendant to deliver the goods to the

s. —: —: —: custom.

canning company, and we question the right of defendant to vary this by showing a custom in conflict with it. The contract was not ambiguous, and required no explanation. But where a custom may be shown it must appear that it was so general that the parties to the contract will be presumed to have contracted with reference to it. *Couch v. Watson Coal Co.*, 46 Iowa, 20; *Berkshire Woolen Co. v. Procter*, 7 Cush. 422; *Fay v. Insurance Co.*, 16 Gray, 461; *Wilson v. Bauman*, 80 Ill. 494; 2 Greenl. Ev. sec. 251. The court below not only found that the custom pleaded was local, but that plaintiff had no knowledge of it. How the knowledge of plaintiff would affect the contract does not appear, but knowledge on the part of the canning company when the shipping receipt was taken is not pleaded nor is it shown. Therefore this defense is not maintained. *Walls v. Bailey*, 49 N. Y. 473; *Higgins v. Moore*, 34 N. Y. 425; *North Penn. Ry. Co. v. Commercial Bank*, 123 U. S. 727, 8 Sup. Ct. Rep. 266; Clarke's Browne, Usages & Cust. 134, note 4. The further examination which we have given this cause on rehearing leads us to conclude that the first decision of this court was erroneous. The judgment of the superior court is

AFFIRMED.

BOSWORTH *et al.* v. THE WESTERN MUTUAL AID SOCIETY.

75 582
86 285

75 582
120 691

1. **Life Insurance: POLICY: CONSTRUCTION: FAILURE TO PAY ASSESSMENTS.** A certificate of membership in the defendant company provided that it should be void in case the amount of any assessment was not paid within thirty days from the date of notice thereof. *Held* that, in the absence of any language in the contract, or in the articles of incorporation or by-laws of the defendant, qualifying the meaning of the word "void," it could not be construed as meaning "voidable at the election of defendant."

2. **——— : NON-PAYMENT OF ASSESSMENT : WAIVER : CUSTOM : EVIDENCE.** In this case payment of the policy was resisted on the ground that the assessments had not been paid as therein required; and the court found that, though the defendant had sometimes accepted assessments after they were delinquent, it had no such general custom that the assured was justified in relying on it,—it appearing that he had no knowledge of such practice, except in a few instances in which his own assessments had been received after becoming delinquent. *Held* that such findings were not without support in the evidence, and could not be disturbed.

Appeal from Polk Circuit Court.—HON. J. H. HENDERSON, Judge.

FILED, OCTOBER 22, 1888.

ACTION of *mandamus* to compel the defendant to make an assessment on its members to pay a loss because of the fact that Drake S. Bosworth was a member of said society, and had deceased prior to the commencement of this action. Trial to the court, and judgment for the defendant. The plaintiffs appeal.

C. C. & C. L. Nourse, for appellants.

Wm. Kennedy and *W. E. Miller*, for appellee.

SEEVERS, C. J.—I. When the deceased became a member of the society he received a certificate of membership, which contains the following provisions: "This

certificate shall be void—*First*, if the amount of any assessment made on account of death benefits or the relief fund is not received at the Des Moines office within thirty days from the date of the notice thereof." The defendant pleaded that the deceased had failed to pay the amount of two death losses of which he had been notified for a longer period of time than above stated, and therefore the policy was void. As the appellants contend, the appellee assumed the burden of proving the non-payment of the assessments as pleaded by it, and further claim that the defendant failed to establish such issue. The court found as a fact that there was a "clear default in the payment of such assessments." This finding has the force and effect of a verdict, and therefore cannot be disturbed, unless the evidence, fairly considered, is insufficient to sustain it. Clearly there was such evidence. Not only so, we think the court could not have made any other finding than it did. It is fully sustained by the evidence.

II. Counsel for the appellants contend that the word "void" in the certificate of membership should be construed as "voidable," at the election of defendant. We do not think this position can be sustained, and *Viele v. Germania Ins. Co.*, 26 Iowa, 57, does not sustain it, as counsel contend. The parties contracted that, if the deceased failed to pay the assessments within the time stated, the certificate should be void. The parties must have meant precisely what is said. There is nothing to construe. There is no other language in the contract or articles of incorporation or by-laws of defendant which has any material bearing on this question, or which qualifies or restrains the meaning of the word "void," as used in the certificate. The following cases sustain these views: *Mandego v. Centennial Mut. Life Ass'n*, 64 Iowa, 134; *Servoss v. Western Mut. Aid Soc.* 67 Iowa, 86.

1. Life insurance: policy: construction: failure to pay assessments.

III. In a reply the appellants pleaded a waiver of the non-payment of the assessments, and the court found

2. ——: non-payment of assessment: waiver: custom: evidence.

that they had failed to establish such defense. This finding must be regarded as supported by the usual presumption which prevails in such cases, and we are not prepared to say that the finding of the court is not sufficiently sustained by the evidence. The material facts relied on as sustaining the theory that the finding is not sustained by the evidence is the following: When death losses occurred, and notices of assessments were sent to the members, and the same were not promptly paid, the defendant afterwards received the amount of the assessment, and regarded the person on whom the assessment was made as a member; that is to say, the defendant in each particular case waived the prompt payment of the assessment. Explanations were made by the officers of the defendant why this was done. Such explanations were regarded by the court as satisfactory. With such finding and conclusion we cannot interfere. Again, the question was whether the custom or usage of the defendant in this respect was so general and usual as to estop it from asserting that there was a forfeiture in this particular case. Here again the finding is against the appellants, and we cannot disturb it. The evidence does not tend to show that the deceased had knowledge of the custom of the defendant in this respect, if it can be so designated. The deceased paid twenty-three of such assessments. Four were received by the defendant from one to three days after maturity, and one five days. All the other payments made by him were prior to maturity. This constitutes the extent of his knowledge that the defendant waived prompt payment. The assessments in question were payable on the thirty-first day of March, 1885, and remained unpaid when Mr. Bosworth died, on May 11, 1888. We are of the opinion that the judgment of the circuit court must be

AFFIRMED.

WARDER, BUSHNELL & GLESSNER v. ROBERTSON.

75	585
88	613
75	585
94	149
75	585
102	560
75	585
122	702
75	585
128	419

Sale: OF MACHINE: BREACH OF WARRANTY: RETURN: WAIVER BY AGENT. Plaintiffs sold defendant a machine upon a written warranty that it would do good work; and the contract provided that if it did not work well defendant should notify plaintiffs, and if, on a second trial in plaintiffs' presence, it did not work as warranted, it might be returned, and the money would be refunded. The machine was sold by P., an agent of plaintiffs, whose duty it was to act for plaintiffs in all matters relating to the working of the machine. It failed to work, and defendant gave P. notice of that fact, but neither he nor any one for plaintiffs appeared to witness a second trial, upon which defendant's right to return the machine was conditioned by the contract. *Held* that, by such failure of plaintiffs, that condition of defendant's right to return the machine was abandoned, and that his right to return it and rescind the sale was the same as if that condition had never existed; and that, though the agent had no power to waive any condition of the contract, he had authority, after such failure of plaintiffs, to waive the return of the machine by defendant, and to authorize him to store it on his farm, when he elected to rescind the sale on account of the breach of the warranty. (Compare *Pitsinowsky v. Beardsley*, 37 Iowa, 9).

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, OCTOBER 22, 1888.

ACTION on two promissory notes. Answer that the notes sued on were given for the price of a combined reaper and mower, which was sold to defendant by plaintiffs with a warranty which had failed, in consequence of which the machine was worthless, and the consideration of the notes had wholly failed. Verdict and judgment for defendant. Plaintiffs appeal.

E. Keeler, for appellants.

Jamison & Mellett, for appellee.

REED, J.—The machine for the price of which the notes were given was sold with the following warranty: "This machine is warranted to be of good material, and well made; and if a single reaper, and properly operated, will cut from ten to fifteen acres of grain per day; or if a combined machine, and properly operated, will cut from ten to fifteen acres of grass per day, with two horses and a driver (and if a self-raker, to do its own raking as well as can be done by hand; and if a dropper, as well as any other dropper), and cut any kind of grass as well as any other combined machine; and if a single mower, and properly operated, will cut as many acres of grass per day, with two horses and a driver, and cut any kind of grass, as well as any single mower of the same size. It is understood that this warranty is invalid and of no effect unless the machine is properly set up and operated, as per our directions. If said machine does not perform as above warranted, notice must be given to Warder, Bushnell & Glessner, Chicago, Ill., subject to a second trial in their presence; when, if the failure is found not to have arisen from any defect in the machine, it shall be kept by the purchaser, and continued use shall be conclusive proof that it fills the warranty. But if on said second trial said machine does not work as above, it may be returned to us, and the money will be refunded." On the margin of the paper on which the warranty was printed appeared the following: "Not valid unless countersigned by J. M. Paul, agent, without addition or erasure." The sale was made by Paul, and he delivered the warranty to defendant at the same time the notes were executed. Defendant had received the machine before that, and had set it up and used it in cutting some grass, but it did not work satisfactorily. On the day before that on which the notes were executed Paul took the machine to the field of a neighbor of defendant, and set it up, and gave it a trial in cutting oats; but defendant was not present at the trial. After Paul left, defendant used it for three days in the same

field, but found difficulty in making it work. He afterwards cut ten acres of grass with it for another neighbor; also some grain and grass for himself, but it worked badly all of the time. He notified Paul twice during the time of the trouble he was having with the machine, but the latter did not go to see it, or witness any trial of it. He, however, on one occasion, gave defendant some "extras" to replace parts of it which, owing to the manner of its working, had worn out, and directed him to store it at the end of the season, and promised that he would set it up the next year, and put it in condition to work according to the warranty. One of the conditions of Paul's contract of employment with plaintiffs was that he would see that every machine sold by him was properly set up and operated, and assist the purchaser in operating it during the harvest, and see that it was kept in proper order, and did good work, and was operated according to the printed instructions, a copy of which he was required to give to the purchaser. The next year another agent of plaintiffs made some repairs to the machine, but did not witness a trial of it; and, when defendant attempted to operate it, it worked as badly as it had done the previous season. He reported the failure to the agent, who furnished some additional "extras," and directed him to give it another trial, and, if it still failed to work, to lay it aside. Defendant gave it another trial, but again failed to make it work, and he stored it on his farm, where it remained at the time of the trial. The evidence tended to show that the machine was worthless for the purpose for which it was intended.

The district court instructed the jury, in effect, that the agents had authority to waive the conditions of the warranty which required a trial in plaintiffs' presence before defendant would have the right to rescind the sale by returning the machine, and left it to them to say whether what was done amounted to a rescission. The only question in the case is as to the correctness of the instructions. It will be conceded that as defendant had notice, by the condition on the margin of the warranty,

that the agent had no authority to make any alteration of the contract before delivery, he could not avail himself of any attempted waiver of its conditions subsequently made by the agent, if he desired to rescind the purchase under its provisions. But that is not the case which the evidence tended to establish. Plaintiffs had neglected to perform the condition which by the terms of the contract was made a condition precedent to the right of rescission, viz., to witness a trial of the machine after notice of the defect. No point is made as to the sufficiency of the notice. Their contract with Paul shows that they relied upon him to act for them in all cases of that kind arising under sales made by him; and as he was the one who was to witness the trial and remedy the defect, if it could be remedied, notice to him answered all the purposes of a notice to them. By failing to perform that condition of the contract they, in effect, abandoned it. But such abandonment did not affect either their liability or the rights of defendant under the warranty. When the breach occurred, and they neglected to perform their undertaking, he had the right, independent of the contract, to rescind the sale because of such breach and neglect. It was competent for the parties to make provision as to the course to be pursued in case of a failure of the warranty, as was held in *King v. Towsley*, 64 Iowa, 75. But when plaintiffs neglected to perform the undertaking on their part, the performance of which was precedent to defendant's right to avail himself of the remedy provided by the contract, its remedial provisions were abandoned, and he could avail himself of such remedies as would have been open to him if that condition had never been embodied in the contract. The question, then, which arose upon the trial was not whether the agent had the power to waive a condition of the contract, but whether he had authority to waive what but for such waiver would have been essential, independent of the contract, to a rescission of the sale, viz., the return of the property. In that regard the language of the instructions is not strictly accurate. But the general doctrine of the

instructions is that, upon the proven facts (as to which there was no controversy), the agent had authority to waive the return of the property. Upon its facts the case is within the holding in *Pitsinowsky v. Beardsley*, 37 Iowa, 9; which is that an agent having power to sell and deliver personal property, with a warranty as to quality, has authority to waive the return of the property when a rescission of the sale is attempted because of a failure of the warranty.

AFFIRMED.

VAN PATTEN & MARKS v. BEDOW & LOOFT *et al.*

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111 61

1. **Statute of Limitations:** CONTINUOUS ACCOUNT: PAYMENTS BY ASSIGNEE OF INSOLVENT. Payments made by the assignee of an insolvent, upon an account filed and allowed against his estate, are not to be regarded as made in continuation of the original account in such sense that an action against the insolvent upon the account will not be barred if brought within five years after the last of such payments. Such payments are not items of the account for that purpose.

2. ———: ACCOUNT: ADMISSIONS: SUBSEQUENT LAPSE OF TIME. The defendants made an assignment for the benefit of their creditors, and recognized the account sued on by including it in their sworn schedule of claims against them. *Held* that this, regarded as an admission that the debt was unpaid, or even as a new promise (which it was not), did not authorize an action upon the account more than five years after the admission or promise was made.

3. ———: PRESUMPTION AS TO RESIDENCE: PLEADING. It will be presumed, unless otherwise alleged, that parties to an action in this state are citizens of the state, and that the cause of action accrued in this state; and where a petition alleges nothing as to these points, but otherwise shows that the cause of action is barred by the statute of limitations, it is bad on demurrer.

Appeal from Mahaska District Court.—HON. J. K. JOHNSON, Judge.

FILED, OCTOBER 22, 1888.

ACTION on account for goods and merchandise. A demurrer to the petition was overruled, and defendants refusing to further plead, judgment was entered for plaintiffs, and defendants appeal.

J. O. Malcolm, for appellants.

J. F. Lacey, for appellees.

BECK, J.—I. The petition declares on an account for merchandise, the last item of which is of date September 12, 1881. The account shows credits, the last two dated September 28, 1881, and May 11, 1882, respectively. The petition shows that on the twenty-ninth day of September, 1881, the defendants executed an assignment for the benefit of their creditors, and the last payment was made by the assignee, and is the same that is credited on the account as of May 11, 1882. The action was commenced February 21, 1887, the notice being delivered for service on that day. The petition alleges that defendants admitted by the assignment, and the list of creditors sworn to and filed therewith, that the debt remained unpaid, and thereby the cause of action was revived. The defendants demurred to the petition on the ground that it shows that the cause of action is barred by the statute of limitations.

1. STATUTE of limitations: continuous account: payments by assignee of insolvent.

II. The demurrer, in our opinion, ought to have been sustained, as the petition shows that the cause of action is barred by the statute of limitations. Plaintiffs insist that the payment by the assignee was made upon the account, and is therefore a proper item of the account, which shows coutinuous dealings up to and including the date of that item, which is to be regarded as the last item of the account at the date of which, under Code, section 2531, the cause of action accrued. We are of the opinion that the payment by the assignee is not to be regarded as a payment on the account, but rather upon the debt as it existed, and had been settled and determined by the proceedings under the assignment. These proceedings are really to some extent judicial in their character. The district court directs payments to be made by the assignee, and determines by trials the validity and amounts of the claims filed in the assignment proceedings. The question of the

existence of the indebtedness is determined by the judgment of the court where it is disputed, and nothing can be paid by the assignee except upon an order of the court for distribution of the assets in his hands. Now, surely it cannot be claimed that payment to the creditor is to be regarded as a continuance of the transactions which are evidenced by the account. The account in fact had been terminated when the assignment was made. It would be absurd to say that, after the failure of a debtor, and the winding up of his affairs in a manner prescribed by the law, by the transfer of all his property to an assignee, an account against him is to be regarded as continuous as long as payments may be made by the assignee thereon. Yet that is this case. The account cannot be regarded as continuous in the contemplation of Code, section 2531, after all the business connected therewith is taken from the debtor's hands and put into the hands of an assignee to be settled as directed by the court in judicial proceedings provided for such cases. We conclude that the payment by the assignee is not to be regarded as an item of the account. The following cases support this conclusion: *Pickett v. Leonard*, 34 N. Y. 175; *Marienthal v. Mosler*, 16 Ohio St. 566; *Roscoe v. Hale*, 7 Gray, 274; *Parsons v. Clark*, 59 Mich. 414; *Whitney v. Chambers*, 17 Neb. 90.

III. It is claimed by plaintiff that the assignment and schedule of defendants, sworn to by the defendants, revived the cause of action. This position may be assumed to be correct. But how long did that revivor keep alive the cause of action? It clearly was not a new promise, but only an admission that the debt remained unpaid. The action, therefore, was properly brought on the original cause of action. The admission removed the bar of the statute to the original cause of action, which began to run anew from the day of the admission. But if it should be held that there was a new promise made by the assignment, which, we think, cannot be admitted; and the action was brought thereon, the same

2. ——: account: admissions: subsequent lapse of time.

result would follow, for the statute would begin to run when the new promise was made. Now, this admission of the debt by the assignment or the new promise, if it be so called, was made September 29, 1881. The action was commenced more than five years after the revivor. It is therefore barred. See *Bayliss v. Street*, 51 Iowa, 627; *Ayres v. Bane*, 39 Iowa, 518.

IV. Counsel for plaintiffs argue that, as the petition does not show that the defendants are and have been residents of Iowa, and that the account accrued in this state, it fails to show that the action is barred. There is nothing in the pleadings to show the place of residence of defendants at any time, or the place where the contract under which the account accrued was made. It is true that defendants' residence and the place of the contract may have been in another state. But the presumption arises that parties to actions are citizens of the state, and that the causes of action arose in the state, until the contrary appears. The petition alleges all facts which, if admitted, entitle plaintiffs to recover. Presumptions will not establish imaginary facts, not pleaded, which defeat recovery. The non-residence of the defendants, or the fact that the contract was made in another state, are proper facts to be set up in reply to the plea of the statute of limitations, and they will not be imagined or presumed until pleaded. If plaintiffs relied upon these facts to defeat the defense of the statute of limitations, they should have pleaded them in their petition or set them up in a reply to defendants' answer. We reach the conclusion that the demurrer of defendants to plaintiffs' petition ought to have been sustained.

3. ——: presumption as to residence: pleading.

REVERSED.

THE STATE v. HATFIELD.

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111 711

1. **Assault with Intent to Rape**: IDENTIFICATION OF DEFENDANT: EVIDENCE. It being beyond dispute that an assault with intent to rape had been made, the only question was as to whether defendant was the guilty party; and *held* that the evidence (see opinion) was sufficient to justify the jury in concluding that he was.

2. **Appeal:** COMPLAINT OF REMARKS OF COURT: RECORD. The court, in the course of the cross-examination of the complaining witness on a trial for an assault with intent to rape, directed the defendant's counsel to treat the witness with respect. It did not appear from the record that any disrespect had been shown in the words used by counsel, but there was nothing to show his manner, nor the manner of the court in directing him. *Held* that this court must presume, in favor of the trial court, that there was some just ground for the direction to counsel, and that it was given in a proper manner.

3. **Assault with Intent to Rape:** CORROBORATION OF COMPLAINANT. The rule of section 4560 of the Code, providing that a person cannot be convicted for rape unless the complaining witness be corroborated by other evidence tending to connect the defendant with the commission of the crime, does not apply to the case of an assault with intent to commit rape.

4. **Alibi:** EVIDENCE: INSTRUCTIONS. (*State v. Maher*, 74 Iowa, 77, *followed*).

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, OCTOBER 23, 1888.

DEFENDANT was indicted, tried and convicted of the crime of assault with intent to commit a rape upon the person of one Adelia M. Bale, and he appeals.

McHenry, McHenry & McHenry, for appellant.

A. J. Baker, Attorney General, for the State.

ROTHROCK, J.—I. There is no question that an assault with intent to commit a rape was made upon Adelia M. Bale, on a sidewalk in one of the streets of the city of Des Moines. The crime was committed late in the night. Mrs. Bale and another woman were returning to their homes from the house of a neighbor, where they had been practicing music for a wedding. The assailant of Mrs. Bale seized her, and threw her upon the sidewalk, pulled up her clothing, held his hand over her mouth, lay down upon her, and attempted to part her legs, and only desisted when surprised by some one coming towards the place where the parties were. We have stated enough of the particulars of the assault. The

1. ASSAULT with intent to rape: identification of defendant; evidence.

other details are not necessary to be stated, and, owing to their disgusting character, it is better that they should be omitted. The woman who was with Mrs. Bale escaped at the first onset, and raised an alarm. When the person who made the assault made his escape, the complainant was found upon the sidewalk very much injured. She was severely bitten by her assailant in several places. The facts of the case, as detailed by the complaining witness, and as disclosed by the injuries upon her person, were such as to influence the minds of jurors, and incline any one having official connection with the prosecution, to the belief that the perpetrator of the crime should be severely punished. We have for that reason carefully examined the transcript of the short-hand notes of the evidence, which appears to be a full report of the trial, including the examination of the witnesses by question and answer, the remarks of the trial judge in making rulings upon the admission and rejection of evidence, and the colloquies between court and counsel during the trial. We have done this because the defendant stoutly claimed upon the trial, and based his defense upon the ground, that he was not the party who committed the crime. The assault was committed on Saturday night, and the defendant was arrested on the charge the following Monday evening. He, with other men, was taken to the house of the complaining witness, and out of seven men she identified the defendant as her assailant. Her identification was positive, and without doubt or question, and she maintained on the final trial with absolute positiveness that the defendant was the guilty party. The woman who was in company with her also identified defendant as the man who made the assault, but not with so much positiveness and certainty. It was moonlight and there was snow upon the ground at the time of the assault. The defendant is an unmarried man, and at the time of the assault lived with his father and mother and two or three brothers. One of the brothers was married, and occupied part of the same house. Several members of the family, including the defendant's

mother, testified, as witnesses, that the defendant was at home and in his bed before the crime was committed. There was other evidence tending to show that the defendant was seen by parties, who knew him, after the crime was committed, and a pipe was found at the place where the crime was committed which the evidence tended to show belonged to the defendant. This evidence, however, was not satisfactory, as the pipe was lost, and was not produced on the trial. After carefully examining all of the evidence, we are not prepared to interfere with the verdict on the ground that defendant was not shown to be guilty of the crime.

The first complaint made in behalf of defendant is that the court improperly and erroneously, and while one of his counsel was cross-examining the complaining witness, addressed counsel in these words: "Mr. McHenry, treat the witness respectfully." The record does not show that the language used by counsel to the witness was improper. He could not cross-examine the witness without making reference to the disgusting details of the crime, and so far as the mere words used by counsel were concerned, there was no disrespect shown to the witness. But counsel claim that the command came from the bench in such a peremptory, arbitrary and commanding tone as to prejudice his client in the minds of the jury. We cannot accept this statement and act upon it. The manner of counsel toward the witness may have been disrespectful, even though the mere words were not; and the court may have been justified in using the language it did as a reproof, or, for aught that appears, the language used by the court may have been uttered by the court in such a tone of voice as to have been unobjectionable.

2. APPEAL: complaint of remarks of court: record.

II. Complaint is made of the court's rulings upon the admission of evidence. We do not discover any ground for these objections. The rulings throughout the trial appear to us to be conspicuons for their fairness to the defendant; and we may say the same of the ruling of the court on the alleged improper conduct of

the county attorney in his closing argument to the jury. There was no just ground for complaint for any of his utterances to the jury.

III. The defendant's counsel requested the court to charge the jury as follows: "Before you can find the defendant guilty in this case there must be evidence of some person or persons, other than the person injured, tending to connect the defendant with the commission of the crime." The instruction was refused, and we think this ruling was correct. It is provided by section 4560 of the Code that the defendant in a prosecution for a rape cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense. The defendant was neither indicted nor tried for a rape, and the statute has no application to any crime except those enumerated in the act. The rule is that a person charged with an offense may be convicted by the mouth of one witness, and, because there are certain exceptions made by the statute is no reason for extending it to crimes not named in the exception. It is useless to contend that the same reason which requires corroboration in a charge for rape applies to an assault with intent to commit that crime. The argument may be sound, and yet the statute does not prescribe the measure of proof requisite to convict for an assault with intent to commit a rape; and this court did not, in *State v. Stowell*, 60 Iowa, 535, so hold, even by implication.

3. ASSAULT with intent to rape: corroboration of complainant.

IV. Complaint is made of the court's instructions to the jury upon the question of an *alibi*. Substantially the same instructions were given in the case of *State v. Maher*, 74 Iowa, 77, and they were approved by this court. Other instructions were complained of. We find no just ground of objection to them. In conclusion, we have to say that we think no prejudicial error occurred in the trial of the case, and the judgment of the district court is

4. ALIBI: evidence: instructions.

AFFIRMED.

RHINES v. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

1. **Railroads:** DEFICIENT FENCE: STOCK KILLED: EVIDENCE UNDER INSTRUCTIONS. In an action for double the value of horses killed on defendant's track, where they were alleged to have gone by reason of a deficient fence, there was no evidence to show that they entered through the opening in the fence rather than at a deficient cattle-guard, except the fact that the last point to which they were traced was nearer to the opening than to the cattle-guard. *Held* insufficient to sustain a verdict for plaintiff on the cause of action pleaded, where the court instructed that he could not recover unless he proved that they entered through the opening. [BECK, J., *dissenting*].

2. **Appeal:** INSTRUCTIONS: REVIEW. The instructions given on the trial are the law of the case for the jury, and the appellee in this court cannot be heard to say that they are wrong, in order to avoid a reversal on the ground that the verdict of the jury is in conflict therewith.

3. **Railroads:** DUTY TO FENCE DEPOT GROUNDS: QUESTION FOR JURY. The law is that railroads are required to be fenced when it is fit, proper and suitable, in view of the public convenience; and depot grounds may be uninclosed when the interests of the road and of the public require it (*Latty v. Burlington, C. R. & M. Ry. Co.*, 38 Iowa, 250); but whether a part of depot grounds which was not the ordinary place for receiving and delivering freight, but where the freight business of a single shipper was transacted, should be left uninclosed, was a question of fact for the jury.

Appeal from Tama District Court.—HON. L. G. KINNE, Judge.

FILED, OCTOBER 23, 1888.

ACTION to recover double the value of two horses which plaintiff alleges were killed on defendant's railway track, by a passing train, at a point where it had the right to fence its track against live stock running at large, but where it had failed to maintain a fence sufficient for that purpose. Verdict and judgment for plaintiff. Defendant appeals.

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Hubbard & Dawley, for appellant.

W. H. Stivers and *J. G. Strong*, for appellee.

REED, J.—I. The injury occurred in defendant's yard, at Tama City. The yard was inclosed by a fence, which, as originally constructed, was sufficient to turn live stock. The railway was intersected immediately west of the yard by one of the streets of the town, and in the original construction of the road a cattle-guard was built in the track at that point, but it was afterwards planked over. An opening, about fifteen feet in width, had also been made in the fence on the north side of the yard some time before the injury, and this remained open at the time. The horses entered the yard either through this opening or at the unguarded street-crossing. Plaintiff's theory is that they entered through the opening. True, it is not expressly alleged in the petition that that was the point of entrance. But it is alleged that the injury was occasioned by the defendant's failure to maintain a sufficient fence, and the damages sought to be recovered is double the value of the property; and if the street-crossing had been the place of entrance, the injury would have been occasioned, not by the failure to maintain a sufficient fence, but by the failure to maintain a cattle-guard, and in that case plaintiff would not have been entitled to recover more than the actual damages. *Moriarty v. Cent. Iowa Ry. Co.*, 64 Iowa, 696. The court instructed the jury, in effect, that plaintiff was not entitled to recover unless he had proven that the animals entered the yard through the opening. The verdict of the jury then necessarily implies a finding that the animals entered the yard through the opening; and the first question argued by counsel is whether that finding is supported by the evidence. The recovery, it is proper to say, was for double the value of the animals. There was no direct evidence as to which was the place of entrance, but plaintiff sought to establish his theory by the circumstances. It was proven that the horses went

1. RAILROADS: deficient fence: stock killed: evidence under instructions.

upon the track from the north (which was the side towards the opening), at a point about three hundred feet from the opening and about one thousand feet from the street-crossing; but they could not be tracked from that point to either the crossing or the opening, and they could have reached it as readily from one as the other. The question, then, is not as to what facts were proven, for as to them there was no conflict or dispute, but is whether the conclusion essential to the establishment of plaintiff's claims for double damages can be drawn from them. When the facts and circumstances from which that conclusion must be deduced, if at all, are examined, all that can be said of them is that they are consistent with plaintiff's theory. But they are also equally consistent with the other theory, viz., that the place of entrance was at the street-crossing. How, then, can it be said that plaintiff's theory is proven? The finding of the jury, we think, lacks the support of evidence. The question as to the place of entrance under the evidence was matter of mere conjecture, and on that state of facts plaintiff was clearly not entitled to recover double the value of the property.

2. APPEAL: instructions: review.

But it was contended that, under the statute (Code, sec. 1289), it was necessary only for plaintiff to prove the injury to his property, and that when that fact was proven the burden was on defendant to prove that the injury was not occasioned by the want of a sufficient fence. But we cannot go in to that question. The district court took the opposite view, and instructed that the burden on that question was on plaintiff, and, that view being favorable to defendant, its appeal does not bring the question here for review. The exception taken to the instruction is not that it does not correctly express the law, but that, assuming its correctness, the evidence presented no question for the jury. It is therefore not reviewable on this appeal. But the only question presented in that connection is whether, assuming that it is correct, the verdict can be sustained, and we think it cannot.

II. The only other question in the case is whether

defendant was bound to maintain a fence on the north line of its yard. The district court submitted that question to the jury, to be determined by them as one of fact. We think that was correct. The opening was made for the accommodation of a single shipper. Ordinarily, goods were received and delivered at another yard, or, more properly, at another place in the same yard, but outside of the inclosure. At a time when the streets were in a bad condition it was more convenient for that particular shipper, whose place of business was immediately north of the inclosed yard, to receive his goods within the inclosure, and the opening was made for that purpose. The law is that "railroads are required to be fenced when it is fit, proper and suitable, in view of the public convenience, and depot grounds may be uninclosed when the interest of the road and public require it." *Latty v. Burlington, C. R. & M. Ry. Co.*, 38 Iowa, 250. But whether the public convenience and the interest of the road require that the grounds in question, which, as we have seen, were not the ordinary place for receiving and delivering freight, should be left uninclosed, was a question of fact, and was properly left to the jury.

3. RAILROADS: duty to fence depot grounds: question for jury.

REVERSED.

BECK, J. (*dissenting*). In my opinion there is no such absence of evidence to support the finding of the jury as to require this court to reverse the judgment. The fact cannot be doubted that plaintiff's horses were upon the railroad track. Conceding the position of the opinion that the measure of plaintiff's damages is determined by the fact whether the animals went upon the track in one place or another, I think it cannot be said that there was no evidence upon which the jury may have found the fact as they did find it. The place of the entrance of the animals is an incidental matter, a circumstance which may be inferred from the other circumstances and facts in the case. I do not think there was an entire absence of circumstances to support the inference drawn by the jury. In my opinion the judgment of the district court ought to be affirmed.

SESSIONS v. KENT *et al.*

Mortgage: FORECLOSURE BEGUN: PAYMENT TO ATTORNEY BY JUNIOR MORTGAGEE: AUTHORITY OF ATTORNEY: SUBROGATION. C., an attorney, had authority from K. to foreclose mortgages in Iowa for him at his discretion. In the exercise of this discretion, he began the foreclosure of two mortgages while they and the secured notes were yet in K.'s hands. While the actions were pending, plaintiff, a junior mortgagee, paid to C. the full amount of the two mortgages, with the interest and costs then accrued, and employed another attorney to proceed with their foreclosure. Afterwards K. sent the notes and mortgages to C., with knowledge that the actions had been commenced and were pending, and C. delivered them to plaintiff. *Held* that C. having had the authority to commence the suits, and having afterwards received the papers, the defect in his apparent right to receive payment when made, caused by the absence of the papers, was cured, and that the transaction was in the nature of an equitable assignment, entitling plaintiff to be subrogated to all the rights of K., and to prosecute the foreclosure cases by their original titles, but for his own use and benefit. (Compare *Harbach v. Colvin*, 73 Iowa, 638).

Appeal from Polk Circuit Court.—HON. JOSIAH GIVEN, Judge.

FILED, OCTOBER 23, 1888.

ON the nineteenth day of November, 1881, C. H. Gatch made and delivered to one Darius E. Kent, now deceased, two promissory notes for the sum of twelve hundred dollars each, and to secure the same executed two mortgages on real estate in the city of Des Moines. This property was afterwards sold by Gatch, and eventually became the property of D. W. Christy, who assumed and agreed to pay the notes and mortgages aforesaid. Christy having failed to pay the notes when they became due, two actions were brought in the circuit court of Polk county in the name of the mortgagee, for the collection of the notes and the foreclosure of the mortgages. After Christy acquired title

to the mortgaged property he executed and delivered to plaintiff a mortgage thereon to secure the payment of a note. After the commencement of the two foreclosure suits aforesaid, plaintiff agreed with Christy to advance the necessary money, and take up the Kent notes and mortgages, hold them as security for the money advanced, prosecute the suits to judgment, and sell the land thereunder. The suits had been commenced in the name of Kent by an attorney named Hugh R. Creighton. On the fourth day of March, 1885, while these suits were pending, plaintiff paid to Creighton, by a check which was subsequently paid by the Des Moines Bank on which it was drawn, the full amount then due on the notes, together with all costs and attorney's fees which had then accrued, and placed the cases in charge of another attorney for further proceedings. When Creighton received payment as aforesaid he did not have the notes and mortgage in his possession, but he afterwards received them from Kent, and delivered them to plaintiff. The two cases were continued in the name of Kent, and judgment and decree of foreclosure was rendered in each on or about the eleventh day of May, 1885. Plaintiff was a defendant in each of those suits, and in one he filed a cross-petition, in which he demanded judgment against Christy for the amount of his note to plaintiff, and the foreclosure of plaintiff's second mortgage. Judgment was rendered in favor of this plaintiff, and against Christy, for four hundred and twenty dollars and an attorney's fee, and a decree foreclosing the mortgage. Special executions were issued in the two cases; and on the sixth day of July, 1885, the mortgaged premises were offered for sale thereunder, and plaintiff bid for the premises amounts sufficient to satisfy the executions, and the bids were accepted. But when plaintiff tendered, in discharge of his bids, receipts in full for the judgments, and money to satisfy all costs, the sheriff refused to accept the tender, on the ground that plaintiff was not the owner of record of the judgments, and held the sales already made of no effect, and adjourned the sales for three days. The plaintiff

then commenced this action, in which he asks that his ownership of the judgments be established; that his bids be held to be valid; and that the sheriff be compelled to issue to him the proper certificates of sale. The defendants deny that decedent, Darius E. Kent, ever authorized a sale of the notes and mortgages in controversy to plaintiff, and deny that decedent ever received any money therefor, and deny that the suits were prosecuted to judgment for the benefit of plaintiff, and deny that he has any interest in them. They further allege that plaintiff is estopped from claiming the ownership of the judgments, for the reason that he was a defendant in the suits in which they were rendered, and that they established the ownership of decedent as against plaintiff. They also claim that the payment to Creighton was insufficient, because not made with money. After a trial on the merits, the circuit court rendered a decree in favor of plaintiff as prayed. The defendants, executors of the estate of decedent, appeal.

Willard & Fletcher, for appellants.

Barcroft & Bowen, for appellee.

ROBINSON, J.—I. The evidence shows that Creighton had acted as a loan-agent for a number of years. It was his custom to receive applications for loans from borrowers, and forward them to the firm of Smith & Tennant, at Westfield, N. Y., by whom persons were found to furnish the money necessary to make the loans. Darius E. Kent was one of the persons so found, and he furnished money for a large number of loans made during a period of time which commenced in the year 1879, and extended into 1885. Much evidence has been offered to show that Creighton acted as the agent of Kent in making these loans. A considerable portion of this is incompetent; but, if all of it is considered, it fails to show that Creighton was the agent of any one but the borrower and Smith & Tennant in making most of the loans for which Kent furnished the money. If plaintiff

succeeds in this case, it must be because Creighton was in fact authorized to receive the payment made to him, or because of the subsequent act of Kent. It appears that Kent treated Creighton as his agent for some purposes. He requested his services in regard to the payment of taxes, the renewal of policies of insurance, the extension of loans, and the payment of money. Some of these letters were such as the lender of money might write to the agent of the borrower, and did not necessarily bind the writer as a principal. But others were of a nature which excluded the idea that they were written to the agent of any one but Kent. This is especially true of some which related to the foreclosure of mortgages. They show that Kent left it to Creighton to decide when it was necessary or proper to foreclose. The deposition of Kent shows that Creighton acted as his attorney in foreclosing and collecting the mortgages which were foreclosed in Iowa before Creighton left,—seven in all. Kent states that in most, if not all, of these cases, the papers were in his possession when the actions were commenced, and that they were afterwards sent to Creighton. It appears that the two cases in question were commenced without the knowledge of Kent; that Creighton wrote for the notes and mortgages in April, 1885, but without stating that he had received payment thereon; and that they were forwarded to him by Kent, or at his request, on the twenty-second day of that month. They were received by Creighton on the twenty-fifth day of April, and were turned over to plaintiff, as already stated. In addition to the evidence already noticed, a witness testified that Kent told him that Creighton was doing his business in Des Moines, and made his collections. The evidence satifies us that Creighton was duly authorized by Kent to act for him in his foreclosure proceedings in Iowa, and to collect money in such cases. It is said that Creighton was not authorized to receive payment for the notes in question, for the reason that at the time he received it he had not been authorized to collect the notes nor to foreclose the mortgages. The answer to this is that the matter of commencing

actions to enforce the collection of Kent's paper seems to have been left to Creighton's decision, and his action in this case was ratified by sending the papers to him with knowledge that proceedings to foreclose them had been commenced and were then pending. But it is said that the papers were sent to be foreclosed, and for no other purpose. Conceding that they were sent for that purpose, in the absence of instructions to the contrary, Creighton would have authority to collect them, and to receive from any one who had the right to pay, any money which was due on them. If Kent had refused to send the papers when requested, the claim of appellants would be better founded; but when they were sent they gave to Creighton the authority to do just what he had done, and his turning over the papers was a completion of the transaction with plaintiff. Creighton having had authority to commence the suit, and having afterwards received the papers, the defect in his apparent right to receive the payment when it was made, caused by the absence of the papers, was cured, and plaintiff was justified in treating the matter as fully closed, so far as it related to Kent. The transaction was not a sale and purchase of the claims of Kent, but was in the nature of an equitable assignment. Plaintiff, as a junior lien-holder, had a right to pay the amount due to Kent, and by virtue of that payment was entitled to be subrogated to his rights. Code, sec. 3323; *Harbach v. Colvin*, 73 Iowa, 638; 1 Jones, Mort. sec. 874; 2 Pom. Eq. Jur. sec. 798; 3 Pom. Eq. Jur. sec. 1211.

II. The other questions raised by appellants are similar to those determined in *Harbach v. Colvin*, *supra*. In our opinion, the decree of the circuit court is correct.

AFFIRMED.

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SCHMIDT v. THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY

1. **Railroads**: CROSSING TRACKS ON STREET: COLLISION: CONTRIBUTORY NEGLIGENCE: EVIDENCE. Plaintiff's husband was driving from the north to the south on a city street which was crossed by ten railroad tracks, and when upon the tenth or south one he was struck by a passing train and killed. It appears that he was not chargeable with any negligence until he had passed the seventh track. After passing this, he might have seen the train approaching, and possibly he did, but he drove ahead. There were engines moving upon some of the other tracks, at greater or less distances from the crossing. The train which struck him was moving nearly twice as fast as was lawful under the ordinances of the city, of which ordinance he may be presumed to have had knowledge; and the evidence made it probable that if it had been run at lawful speed he would have succeeded in crossing before its arrival, and that the collision would have been avoided. In consideration of the facts that he was in a place of danger when he was on the seventh track, and that he had to choose between going forward and turning back at that point, and that he may well have relied upon the train's being run at lawful speed, and therefore reasonably concluded that he could make the crossing in safety, *held* that he could not be said, as matter of law, to have been guilty of contributory negligence, but that the question was properly submitted to the jury.

2. ——: ——: DUTY TO KEEP FLAGMAN: PLEADING: INSTRUCTIONS. In such case the petition stated that "the defendant, without giving any proper warning or signal of the approach of its train, and without keeping any flagman at said crossing to give warning, * * * as it was required by an ordinance duly passed," etc. *Held* that this plea was broad enough to sustain an instruction submitting to the jury the question whether under the circumstances ordinary care and prudence did not require the defendant to keep a flagman at the crossing, irrespective of any municipal regulations.

Appeal from Clinton District Court.—HON. C. M. WATERMAN, Judge.

FILED, OCTOBER 23, 1888.

THE plaintiff's husband was killed by a train on the defendant's road at the crossing of Fourth street in the city of Clinton, and she, as administratrx of his estate, seeks to recover the damages sustained. Trial by jury, verdict and judgment for the plaintiff, and defendant appeals.

E. S. Bailey and *S. K. Tracy*, for appellant.

Geo. B. Young and *A. Howat*, for appellee.

SEEVERS, C. J.—The deceased, in the forenoon of the sixteenth day of June, 1887, was traveling in his wagon, drawn by two horses driven by himself, on Fourth street, in the city of Clinton. He was going from the north to the south, and Fourth street is crossed by ten railroad tracks. The first eight, numbering from the north, belong to the Chicago & Northwestern Railway Company; the remaining two to the defendant. The evidence, without conflict, shows that the deceased did not stop his team after he passed onto the first track, and that he was struck and killed by a train of cars which was being backed on defendant's track number ten. The deceased was familiar with the crossing, and he had driven his team over it quite frequently. The petition states that there was an ordinance of the city requiring the defendant to keep a flagman at the crossing; but this issue was withdrawn from the jury. It is also alleged in the petition that there was an ordinance which prescribed that trains should not be operated within the city limits at a greater speed than six miles an hour. There was evidence tending to show that the train in question, at the time, and just prior to the accident, was moving at the speed of from ten to twelve miles an hour. There were cars standing on several of the tracks, and a whole train was standing on track number seven; the last car of which, as the evidence tended to show, projected into the street. Engines were being moved on some of the tracks, at

some distance, however, from the crossing. There was evidence tending to show that one or two cars were standing on track number eight, west of Fourth street, and distant therefrom from twenty to sixty feet. The several railway tracks do not cross the street at right angles, but from a southwesterly to a northeasterly direction, and the train in question was moving from the southwest towards the crossing. Special interrogatories were submitted to the jury, which, and the answers thereto, are as follows: "(3) If he had so stopped or listened, could he have seen this train before going upon track number ten? Answer. Yes. (4) Was the team the deceased was driving easy to control? A. Yes. (5) If the deceased had stopped his team at track number seven, about how far could he have seen this train approaching? A. He could not see it. (6) If he had stopped his team from track number eight, how far away could he have seen this train approaching? A. About three hundred feet. (7) If he had stopped his team just before reaching track number nine, could he have looked up track number ten and plainly seen this train approaching? A. Yes. (8) Was he walking or trotting his team across these tracks? A. Walking. (9) After the deceased had driven over track number eight, what was there to have prevented his seeing the approach of this train, if he had looked? A. Nothing."

I. The negligence of the defendant is conceded, but it is contended by counsel for appellant that it clearly appears from the special findings and the uncontroverted evidence that the deceased was guilty of such contributory negligence as will prevent a recovery. It is insisted that it was the duty of the deceased to stop his team and look or listen before he reached track number ten, and that, if he had done so, the accident would not have occurred; and therefore it follows that he was guilty of contributory negligence, which was the proximate cause of his death. But a traveler on a highway, when approaching a railroad crossing, is not

1. RAILROADS: crossing track on street: collision: contributory negligence: evidence.

under all circumstances bound to stop his team and look or listen for an approaching train; that is to say, his duty in this respect is not absolute. *Funston v. Chicago, R. I. & P. Ry. Co.*, 61 Iowa, 452. That such is the ordinary rule will be conceded, but there was no more reason why the deceased should have stopped his team when he reached track number eight, than when he was about to cross either of the other tracks, and it cannot be claimed, we think, that he was bound to stop his team before he reached each of the other tracks; but clearly he was bound to exercise ordinary diligence before attempting to cross either of the tracks. In fact, he was required to use ordinary diligence all the time commensurate with the risk. From the number of tracks and the number of trains moving, and cars standing thereon, and his acquaintance with the crossing, the deceased, it will be conceded, was required to exercise an unusual degree of diligence. While this is so, the well-established rule is that the question whether a person who has occasion to cross a railway track has been guilty of contributory negligence is ordinarily a question for the jury, and it becomes a question of law only when there is no serious dispute as to the facts or the conclusions that can be drawn therefrom; and ordinarily, subject to this general rule, each case must be determined upon the particular facts appearing in evidence, for no two cases are precisely alike, although the shades of difference cannot always be accurately defined. *Whitsett v. Chicago, R. I. & P. Ry. Co.*, 67 Iowa, 150. If the deceased could see or hear the movement of trains as well without stopping his team as he could if he did so, then ordinary or usual diligence did not require that he should do the latter; or, if he did see the train, there was no reason why he should stop his team to ascertain what he already knew. The material question is whether the deceased was negligent after he passed track number seven. The jury were warranted in finding that there was a car standing on track number eight, which, to some extent, prevented the deceased from

seeing the train, and the jury found that he could not see it when he was at or on number seven, but he could have seen it from track number eight; that is to say, when he was on that track he could see the train. As he was seated in his wagon, and as the width of the tracks from the outside of one rail to the other was six feet and eight inches, the heads of the horses must have been in the space between tracks numbers eight and nine. The street is eighty feet wide, but following the railroad tracks it is one hundred and seven feet wide, for the reason that the tracks do not cross it at right angles. The distance from the south rail of track eight to the north of track ten is between three and four feet, following the line of the street. The crossing was planked all the way, and therefore there was no difficulty, nor was there anything to cause any delay in passing on it. There is some evidence tending to show that the deceased saw the train either before or just after he crossed track number eight; but such evidence is in the nature of conclusions from what the deceased did. There is evidence tending to show that, after crossing track eight, he stopped the horses with the lines, and turned them in an easterly direction, so as to cross track ten further from the approaching train than if he had not done so. As there was no obstruction to prevent the deceased from seeing the train after he crossed track eight, and it was daylight, we think the jury were warranted in finding that he did see it once, when he turned east, but he believed he could safely cross in front of it; and the jury were further warranted in finding that, at the speed he was going, and the distance he had to go, and the train to move, the accident would not have occurred if the train had been moving at six miles an hour. Upon the supposition, then, that the deceased saw the train, and made the attempt to cross in front of it, was he, as a matter of law, guilty of contributory negligence? When he saw the train, it cannot be assumed that he knew, or had reason to believe, that it was moving at a greater rate of speed than six miles an hour. But we think he had a right to assume that it was not running any faster

than provided by the ordinance of the city, of which it should be presumed he had knowledge, as he was a resident thereof, and had been such resident for several years, as the jury could from the evidence well find. It must be remembered that the deceased, when it is said he should have stopped, was on a railroad track, which, ordinarily, at a place like the one in question, where trains were frequently moving, cannot be regarded as a place of safety. The deceased was compelled to either stop or go on. There was at least some peril in whichever course he took. He chose the latter, and the instinct of self-preservation requires us, or, rather, the jury, to presume that he thought it was better to go on than to remain still. The deceased did not do so in a hurried manner, but moved as if he thought the train was sufficiently distant to permit him to cross in front of it; and we think the jury could well find, under the evidence, that the accident would not have occurred if the train had not been running at a speed nearly or quite double that at which it could lawfully move. Under these circumstances, we do not think, as a matter of law, that it can be said the deceased was guilty of such contributory negligence as will prevent a recovery, for the reason that it was for the jury to say whether, under the circumstances, the deceased was negligent; and therefore the court did not err in refusing to direct the jury to find for the defendant, and in overruling the motion for a new trial.

II. In the fifth paragraph of the charge, the court withdrew from the jury the question as to the defendant's negligence for the reason that it had no flagmen at the crossing, because no such ordinance had been introduced in evidence; but the court submitted to the jury the question whether, under the circumstances, ordinary care and prudence did not require the defendant to keep a flagman at the crossing to warn persons passing over it, irrespective of any municipal regulations. This is said to have been erroneous, upon the sole ground that there was no such issue or allegation in the petition upon

2. ——: ——: duty to keep flagman: pleading: instructions.

which the charge of the court could be properly based. It is stated in the petition that "the defendant, without giving any proper warning or signal of the approach of its train, and without keeping a flagman at said crossing to give warning and notice to persons passing upon said street, and to signal danger when trains were approaching or crossing said street, as it was required by an ordinance duly passed," etc. We think the court did not err in instructing the jury as it did, for the reason urged by counsel. The petition is broad enough to base thereon the question submitted to the jury. It is said that the court erred in refusing three instructions asked by the defendant. What we have said, we think, in connection with the instructions given, sufficiently indicates that the court did not err in refusing the instructions asked. AFFIRMED.

SUPPLEMENT.

[The following opinions were retained on petitions for rehearing, and did not come into my hands in time for insertion in their chronological order.—REPORTER.]

DONNELLY v. BURKETT *et al.*

1. **Malicious Prosecution:** EVIDENCE. In an action for malicious prosecution, the plaintiff offered in evidence an affidavit made by the defendant, and filed in the prosecution complained of, to the effect that the sheriff was partial to the defendant in that case, and prejudiced against the prosecution. *Held* that it was properly excluded as being irrelevant.

2. ——: ——. In such case certain records in the prosecution were properly excluded, when offered by plaintiff, because all the facts intended to be proved thereby were admitted by defendant's answer.

3. ——: ——: APPEAL. In such case the exclusion of a question asked the short-hand reporter as to what a witness testified to on the prosecution cannot be reviewed on appeal, where there is nothing to show what fact was intended to be elicited.

4. ——: ——: STATEMENTS TO COUNSEL. In such case one of defendants testified to statements he made to counsel before the prosecution was begun, and then, in response to a question, he testified that he did not withhold any fact in making the statement. *Held* that such testimony was properly admitted.

5. ——: ——: NEWSPAPER STATEMENTS: OBJECTION TO: ESTOPPEL. Where plaintiff, in such case, offered parts of a newspaper statement in evidence, he could not be heard to object to the defendant's offering omitted portions of the same statement, on the ground of incompetency.

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6. ———: PROBABLE CAUSE: INSTRUCTION: GROUPING FACTS. In such case the court instructed the jury that if defendants honestly thought the plaintiff guilty of the crime with which they had charged him, and that belief was based upon a knowledge of facts and circumstances tending to show guilt, which were sufficient to induce an ordinarily reasonable and cautious man to believe plaintiff guilty, the jury should find probable cause. *Held* correct and sufficient, without enumerating and specifying the facts which would induce such belief of guilt. (*Johnson v. Miller*, 63 Iowa, 529, *distinguished*).

7. **Appeal:** VERDICT: EVIDENCE. Where a verdict is based on conflicting evidence, this court cannot set it aside as not being supported by the evidence.

8. **New Trial:** NEWLY-DISCOVERED EVIDENCE. A new trial should not be granted upon the ground of newly-discovered evidence which is merely cumulative and impeaching.

Appeal from Linn District Court.

FILED, OCTOBER 12, 1887.

ACTION to recover for a malicious prosecution. There was a judgment upon a verdict for defendants, rendered November 21, 1885, from which plaintiff appeals.

Preston Bros., *Remley & Ercanbrack* and *Wolf & Landt*, for appellant.

Piatt & Carr, *W. G. Thompson* and *M. P. Smith*, for appellees.

BECK, J.—The plaintiff, a physician, was called to treat Mrs. Alice Downing, a married daughter of the defendant first named in the title of the action. He removed from her uterus a mole, and she afterwards died from the effects of the operation. After her burial the body was disinterred, and a *post-mortem* examination was held, and the jury returned a verdict that she "came to her death by the use of instruments in the hands of Dr. Donnelly, of Tipton." Plaintiff was held to bail for his appearance before the grand jury, but subsequently discharged upon *habeas corpus*. He was afterwards indicted for causing an abortion, and upon trial was acquitted. He alleges in his petition that his

arrest and prosecution were malicious, and without probable cause, and asks to recover damages therefor. He complains upon this appeal of various alleged errors. The questions thus raised we will consider in the order of their discussion in the argument of his counsel.

I. The defendant Burkett, before the trial of the indictment, made and filed an affidavit charging that the person acting as sheriff was partial to defendant, and prejudiced against the prosecution. It is such an affidavit as would support a motion for the appointment of an elisor. Upon the trial of the case, the plaintiff offered the affidavit in evidence, but it was rejected. We do not discover from the record before us that a motion was made for an elisor, based upon this affidavit. It therefore could not have been material evidence. But, even if it be assumed that an elisor was appointed upon the showing made by the affidavit, it was irrelevant. It surely did not show that the prosecution was maliciously, and without probable cause, commenced or prosecuted.

1. MALICIOUS prosecution: evidence.

II. The plaintiff offered in evidence the original court files in the case upon the indictment, the order of discharge entered therein, the proceedings in the *habeas corpus* case, the warrant issued, and other proceedings under the verdict of the coroner's jury. These papers and records were correctly excluded, for the reason that the facts intended to be proved thereby were admitted in defendant's answer. The time of the court should not have been consumed in hearing evidence to establish facts which were admitted in the pleadings.

2. —:—.

III. A question was asked a witness, the shorthand reporter of the trial upon the indictment, as to a fact testified to by one of the defendants upon that trial. An objection thereto was sustained. We cannot review the court's ruling, for the reason that the record fails to show, and we cannot presume, what fact was intended to be elicited by the question. We cannot presume it would have been favorable to plaintiff, thereby presuming error.

3. —:—: appeal.

IV. One of the defendants testified that he had consulted counsel before the inquest was held. He testified to statements he made to the counsel, and was then asked if he withheld any fact in making the statement, and he answered that he did not. The evidence, we think, was competent. It is to the effect that he told the whole truth. If plaintiff doubted the statement of the witness, he was privileged to make all enquiries relevant to the matter upon cross-examination. We think there was neither prejudice nor error in the court's rulings.

4. —:—: statements to counsel.

V. The plaintiff offered in evidence a newspaper statement of the evidence before the coroner's jury. No objection was made to this evidence. The defendant subsequently offered omitted parts of this evidence, to which plaintiff objected; but, as he offered a part of this evidence, he ought not to be heard to object to all of it; nor can he be heard to deny its competency after having received the benefits of a part of it.

5. —:—: newspaper statements: objection to: estoppel.

VI. The plaintiff objected to certain instructions on the subject of probable cause, on the ground that the jury are not informed what facts constituted probable cause for the prosecution. We think the instructions are not justly subject to this objection. Among other rules for determining the existence of probable cause, the court informed the jury that if defendants honestly thought the plaintiff guilty, and that belief was based upon a knowledge of facts and circumstances tending to show guilt, which were sufficient to induce an ordinarily reasonable and cautious man to believe plaintiff guilty, the jury should find probable cause. This rule is clearly correct, and sufficient to enable the jury to determine the issue of probable cause.

6. —: probable cause: instruction: grouping facts.

Counsel for plaintiff think the court erred in failing to "group facts" in the instructions tending to show probable cause; relying upon *Johnson v. Miller*, 63 Iowa, 529. We do not think a failure to do this, when it is unnecessary to direct the minds of the jury to facts

to be considered upon the question of probable cause, is error. We think it was unnecessary in this case. The jury having been informed that if defendant believed, from facts which would induce a man of ordinary caution to believe, plaintiff guilty, there was probable cause for the prosecution. It was not necessary for the court to enumerate and specify the facts which would induce such belief.

VII. It is insisted that the verdict is in conflict with the evidence, and the court below therefore erred in overruling a motion for a new trial. The evidence was conflicting, and it cannot be said that the verdict is so wanting in support of the proof as to authorize the court below to disturb it.

7. APPEAL: verdict: evidence.

VIII. A motion for a new trial, based on the ground of newly-discovered evidence, was rightly overruled. This new evidence is cumulative or impeaching in its character, and, under familiar rules of the law, is not, therefore, the ground for a new trial.

8. NEW TRIAL: newly-discovered evidence:

In our opinion the judgment of the district court ought to be AFFIRMED.

O'CONNER v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Pleading: ORDER TO DIVIDE COUNT: SUBSTITUTE NOT IN COMPLIANCE STRICKEN OUT. Plaintiff, in one count, sued defendant for constructing side-tracks in front of his premises; for improperly using such tracks; for casting snow upon his premises; and for constructing drains and ditches, and depositing dead animals, in front of his premises. *Held* that the court properly ordered him to plead his separate causes of action in separate counts; and that, when he filed a substitute without attempting to comply with the order, the court properly sustained a motion to strike it from the files.

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, OCTOBER 25, 1887.

O'Conner v. The Chicago, R. I. & P. Ry. Co.

THE plaintiff is the owner of a certain lot fronting on Vine street in the city of Des Moines. The defendant has constructed its road on said street, and is operating the same. This action is brought to recover damages alleged to have been sustained by the unauthorized construction of side-tracks; also for the improper use of the side-tracks; also for the conduct of the defendant in casting snow upon his premises; also for the conduct of the defendant in constructing drains and ditches; also for the conduct of the defendant in depositing dead animals in front of his premises. The several matters of complaint were embraced in one count or division of the petition. The defendant moved that the plaintiff be compelled to divide the count, setting up as ground therefor that it showed more than one cause of action. The court sustained the motion, and the plaintiff filed a substitute for the count, but did not attempt to comply with the order of the court to divide the count. The court, on motion, struck out the substitute. The plaintiff appeals both from the order to divide and from the order striking out.

James Nugent and *Whiting S. Clark*, for appellant.

T. S. Wright, for appellee.

ADAMS, C. J.—The original count set out separate acts of the defendant, upon each of which, upon the plaintiff's theory, he was entitled to recover, even if he failed to recover for the other acts. The acts were set out, therefore, as separate causes of action, and the court did not, we think, err in sustaining the motion to divide. This motion it was the duty of the court to enforce. When, therefore, the plaintiff filed a substitute, without attempting to comply with the order to divide, the court, we think, properly struck out the substitute. This was necessary by way of enforcement of its order to divide.

AFFIRMED.

TOLIVER *et al.* v. MORGAN *et al.*

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1. **Judgment**: PARTY DEFENDANT: EVIDENCE. While the omission to enter the name of a party defendant in the appearance docket, in entering the suit therein, as required by section 198 of the Code, raises a presumption that such party was not named as a defendant in the petition, such presumption is overcome by the decree in the case, which recites that such party was a defendant.

2. ——: JURISDICTION: ENTRY OF PETITION IN APPEARANCE DOCKET. The failure of the clerk, in entering a suit in the appearance docket, as required by section 198 of the Code, to enter the name of one of the defendants therein, does not, under section 200 of the Code, amount to a failure to file a petition as against him, and does not affect the jurisdiction of the court to render a judgment against him.

3. ——: ——: SERVICE OF NOTICE: FINDING OF COURT: CONSTRUCTION OF DECREE. The court, in the decree of foreclosure, expressly found that the "foregoing defendants" had been duly served with notice. B. was not named as a defendant in the caption, nor in any part of the decree preceding the quoted words. But in the caption the abbreviation "*et al.*" was used to indicate that there were other defendants than the one named. *Held* that this was to be understood as meaning the other defendants named in the petition; and that this, together with the fact that B. was named later in the decree as a defendant, and the decree purported to bar him, was sufficient to show that the court found that he had been served with notice.

4. ——: ——: ——: CONCLUSIVENESS OF DECREE. Where the fact of service of notice appears from the decree, it is shown by the record, if there is nothing in any other part of the record showing otherwise.

5. **Mortgage**: PURCHASE BY WIFE UNDER SENIOR LIEN: REDEMPTION. Where the mortgagor's wife signs mortgages only to relinquish her dower, and to secure her husband's debts, she may acquire title to the land under a foreclosure of the senior mortgage, the same as any other person, and the junior mortgagee, who has been made a party to the foreclosure, is not entitled to redeem from her after the statutory time has expired.

Appeal from Calhoun District Court.

FILED, OCTOBER 27, 1887.

Toliver v. Morgan.

ACTION to redeem from a foreclosure sale. The court dismissed the plaintiff's petition, and the plaintiff William Bolles appeals.

J. H. Ballagh, *F. S. Rice* and *E. C. Stevenson*, for appellant.

J. C. Kerr and *T. F. Barbee*, for appellees.

ADAMS, C. J.—The plaintiff Bolles and one Dayton S. Morgan held each a mortgage upon the land in question, executed by J. L. Dean and wife, the plaintiff's mortgage being junior. Dayton foreclosed, and caused the land to be sold on execution, and obtained a sheriff's deed, and afterwards conveyed to the defendant Margaret M. Dean. In the decree of foreclosure Bolles is mentioned as defendant, and the decree purports to bar his rights. He avers, however, that he was not in fact a party to that action; that he was, and is now, a non-resident of the state, and was not served with notice of the suit, either personally, or by publication. The evidence shows that the courthouse in which the papers in the case were kept has been destroyed by fire, and that the papers cannot be found. The record book containing the decree was preserved, and also the appearance docket. The decree expressly mentions Bolles as a defendant, and justifies the assumption that he was named in the petition as such. The appearance docket, however, showed merely the filing of the petition, the date thereof, and the name of the plaintiff, and names of the defendants James L. Dean and Margaret M. Dean; the latter being the mortgagors. It is insisted by Bolles that the entry of his name in the appearance docket was necessary to give the court jurisdiction of him. In support of this position he relies upon sections 198 and 200 of the Code.

1. JUDGMENT: party defendant: evidence.

If Bolles was named in the petition as defendant, as we think appears from the decree, his name certainly should have been entered in the appearance docket. Section 198 provides that in entering suits the clerk

shall set out the full names of all the parties, plaintiffs and defendants, as contained in the petition. The question presented is as to the effect of this omission. It may be conceded that the appearance docket was *prima-facie* evidence that Bolles was not named as defendant in the petition. But this we think was overcome by the decree, and there remains only the question as to whether the entry of Bolles' name in the appearance docket was necessary to constitute the filing of a petition as against him. His position is that a petition cannot be deemed filed as against any one whose name is not entered in the appearance docket. He relies upon section 200 of the Code, which provides that "the clerk shall, immediately upon the filing thereof, make in the appearance docket a memorandum of the date of the filing of all petitions, demurrers, answers, motions or papers of any description in a cause; and no pleadings of any description shall be considered as filed in a cause until the said memorandum is made."

2. ——: jurisdiction: entry of petition in appearance docket.

In the case at bar, there was a memorandum of the date of the filing of the petition in the appearance docket, and we cannot say that the petition was not to be considered as filed without going beyond the statute. A provision of so arbitrary a character is not, we think, to be extended by implication, and especially to defeat the jurisdiction of a court which would otherwise clearly exist. An omission by the clerk to enter the name of a defendant in the appearance docket might have the effect to give a right of action against the clerk to any one who should be misled by the omission, to his injury, but we do not think that such omission should be regarded as affecting the jurisdiction of the court.

We come, next, to the question as to the service of notice. The court expressly finds that the "foregoing defendants" were duly served with notice. Now, while it is true that Bolles had not been expressly named in the caption as defendant, nor in any part of the decree preceding the use of the words "foregoing defendants,"

3. ——: ——: service of notice: finding of court: construction of decree.

yet in the caption the well-known abbreviation "*et al.*" is added to the name of James L. Dean as defendant, and we take notice that it means the other defendants in the case as shown by the petition. This, together with the fact that Bolles is expressly named later in the decree as defendant, and that the decree purports to bar him, leaves no doubt that the court regarded him as one of the defendants referred to by the abbreviation, and intended to be understood as finding that he had been duly served with notice. The finding of the court that Bolles was duly served with notice must be presumed to be correct, in the absence of any evidence showing to the contrary. *Bradley v. Jamison*, 46 Iowa, 68. The appellant claims that a different rule was held in *Sweeley v. Van Steenburg*, 69 Iowa, 701. In that case the court said that the fact of the publication of the notice must be shown by the record, or the judgment is void. But where the fact of service appears from the decree, we think it is shown by the record, if there is nothing in any other part of the record showing otherwise.

4. —: —: —: conclusiveness of decree.

It is said, however, that the evidence shows that the affidavit for publication was filed after the publication, and that the service by publication is therefore necessarily void. To this it is sufficient to say that we have examined the evidence referred to as showing that the affidavit was filed after the publication, and we have to say that we think that the evidence fails to show such fact.

Margaret M. Dean, the wife of the mortgagor, having now acquired the title to the land, it is insisted by the appellant that he should have a right to redeem from her because she joined in the mortgage. But the debt secured was the debt of her husband, and it does not appear that she joined except to relinquish dower. We cannot see how such joinder gives the appellant any rights as against the land.

5. MORTGAGE: purchase by wife under senior lien: redemption.

We think that the decree of the district court must be AFFIRMED.

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SWAN V. WHALEY *et al.*

1. **Tax Sale**: NOTICE TO REDEEM: BY WHOM GIVEN: "HOLDER OF CERTIFICATE." Under section 894 of the Code, which provides that the notice to redeem from a tax sale shall be given by "the lawful holder of the certificate,"—when the purchaser indorses the certificate in blank and delivers it to another person with the intent thereby to transfer the property in it to such other person, such person is the "lawful holder," and is the proper person to give the notice; no matter whether or not the assignment has been recorded in the office of the county treasurer, under section 888 of the Code.

2. ——— : ASSIGNMENT OF CERTIFICATE: NOT RECORDED: WHO ENTITLED TO DEED. P. and F., partners, bought in the land at tax sale. In the settlement of their affairs, P. indorsed the certificate in blank and delivered it to F. as his property. F. gave the notice to redeem, and then sold and assigned the certificate to W. Neither of the assignments was recorded in the treasurer's office. *Held* that such recording was not necessary to entitle W. to a treasurer's deed, and that a deed to him was valid.

3. ——— : REDEMPTION BY CONTRACT WITH HOLDER OF CERTIFICATE: RISK ASSUMED. While a mode of redeeming from tax sales is pointed out by statute, the owner of the property may effect redemption by contract with the holder of the certificate; but if he elects to take that course he must know at his peril whether the one with whom he deals is the owner of the certificate; and the fact that no assignment is recorded is not conclusive evidence that none has been made, since the record of the assignment is not made constructive notice of the rights of the assignee.

Appeal from Butler Circuit Court.

FILED, DECEMBER 8, 1887.

ACTION in equity to cancel a tax deed. The circuit court denied plaintiff relief, and he appeals.

Hemenway & Grundy, for appellant.

J. H. Scales and *Gibson & Dawson*, for appellees.

REED, J.—The facts of the case are as follows: The real estate in question was sold in 1880 for the delinquent taxes of 1879, and was bid in by J. W. Phillips, to whom a certificate of purchase was issued. Clark Fairfield, however, was interested in the purchase of this and other tracts of real estate sold at the same sale, being in partnership with Phillips. Afterwards the partners made a division of the certificates acquired under the sale, and the one in question fell to Fairfield. For the purpose of transferring it to him, Phillips wrote his name upon the back of it, and delivered it to him. After the expiration of two years and nine months from the date of the sale, Fairfield caused the usual notice of the expiration of the period of redemption to be served on plaintiff, who was then in possession of the property, and the actual owner thereof, although the legal title was in another. After the service of the notice on plaintiff, Fairfield sold, and, by proper writing indorsed thereon, assigned the certificate to defendant A. A. Whaley; but no evidence of that assignment, or the one from Phillips to Fairfield, was recorded in the treasurer's office. After the service of the notice to redeem on plaintiff, he applied to Alex. Christie for the loan of an amount of money sufficient to make the redemption. Christie preferred to purchase the certificate, and hold it or take a deed under it, and hold the title as security for the loan, and the parties agreed to take that course, provided the owner was willing to sell the certificate. They applied to Fairfield, and he agreed to assign the certificate to Christie for sixty-five dollars, which was slightly in excess of the amount that would have been required to redeem. He directed them to deposit the amount with the county auditor, and promised that he would assign the certificate to Christie, and leave it with the auditor, and receive the money. As a matter of fact, however, he had already sold and assigned it to Whaley, but had forgotten the transaction. Christie left the money with the auditor, and explained to him the arrangement with Fairfield, but

directed him, in case Fairfield did not assign the certificate and leave it with him before the expiration of the period for redemption, to apply the amount necessary to make the redemption on the last day of the period. Plaintiff was present at the time, and acquiesced in that direction. The parties learned afterwards, however, that Fairfield had not been able to find the certificate, and they determined that they would not make the redemption, but would wait until the certificate should be found, or a duplicate procured, and the assignment made, and they informed both the auditor and Fairfield of that determination; but the money was permitted to remain in the auditor's hands. After the expiration of the period for redemption, Whaley presented the certificate to the county treasurer, who executed to him a tax deed of the premises.

I. It is contended that the transaction between Phillips and Fairfield did not amount to a legal assignment of the certificate to the latter, and hence he was not the proper person to give the notice to redeem; and, not being himself vested with the legal title to the certificate, his assignment to Whaley did not invest him with the title thereto, or entitle him to receive a deed thereunder. Section 888 of the Code is as follows: "The certificate of purchase shall be assignable by indorsement, and an assignment thereof shall vest in the assignee, or his legal representative, all the right and title of the original purchaser. * * * In case said certificate is assigned, then the assignment of said certificate shall be placed on record in the office of the county treasurer in the register of tax sales." The contention is that this section requires a formal assignment, transferring to the assignee all the rights and interests of the purchaser, to be indorsed upon the certificate. So far as the objection that Fairfield was not the proper party to give the notice to redeem is concerned, we deem it unnecessary to inquire as to the soundness of that position. Section

1. Tax sale: notice to redeem: by whom given: "holder of certificate."

894 provides that the notice shall be given by "the lawful holder of the certificate." By "the lawful holder" is meant the one who in law is the owner of the certificate, and entitled to the rights and benefits which may accrue under it. Now, while the evidence of Fairfield's title to the certificate in question may have been defective, there is no doubt that he was in law the owner of it. He had it in possession under the transaction with Phillips, the only other person who ever had any interest in it, and who delivered it to him with the object of transferring to him the property in it, and who, at the time of the transfer, did what the parties supposed was essential to pass the title to him. If redemption had been made, he would have been entitled to receive the money, and if he had retained the certificate until the right to a deed accrued, he would have been entitled to it. Beyond doubt, we think he was "the lawful holder of the certificate."

II. It is contended that Whaley was not entitled to receive a deed of the property from the treasurer, because of the insufficiency of the assignment from Phillips to Fairfield, and of the fact that neither of the assignments under which he held was recorded in the treasurer's office. When the right to redeem the property from the sale expired, some person was entitled to receive a deed. The right to redeem terminated at the expiration of ninety days from the date of the service of the notice to redeem, and the right to a deed accrued at that time. Code, sec. 895. And of necessity that right must have accrued to some person. To whom did it accrue if not to Whaley? Clearly it did not accrue to either Phillips or Fairfield, for neither of them retained any interest in the certificate, nor was either of them claiming any interest therein. The intention of the statute is that the deed shall be given to the lawful owner of the certificate, and clearly Whaley was such owner. The certificate of purchase is a mere chattel, and, like any other article of personal property, is the subject of bargain and sale. The provisions of section 888, with

2. —: assignment of certificate: not recorded: who entitled to deed.

reference to the assignment and the recording thereof in the register of tax sales, relate merely to the creation and preservation of the evidence of the sale. They are not essential to the sale itself. A right in and to the certificate which would be enforceable in law can be created without either the execution or recording of any written assignment. The object of the provision is to afford the treasurer certain evidence of who is entitled to the deed when the right to one accrues. If, however, he should, without having any evidence of the assignment, execute a deed to the one who in fact and law was entitled to receive it, the question of its validity would not be affected by the fact that he acted without such evidence.

III. Finally, it is contended that as Whaley neglected to place his assignment of record, and plaintiff contracted with Fairfield with reference to its purchase and assignment to Christie, with the view of effecting a redemption, and without notice of Whaley's assignment, the latter is now estopped to assert title under his deed. But the statute does not make the record of the assignment constructive notice of the rights of the assignee. While a mode of making the redemption is pointed out by the statute, the owner of the property may effect redemption by contract with the holder of the certificate. But if he elects to take that course, he must know at his peril whether the one with whom he deals is the owner of the certificate.

3. ——: redemption by contract with holder of certificate: risk assumed.

AFFIRMED.

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WESTCOTT v. WESTCOTT.

1. **Gift: PRESUMPTION FROM POSSESSION: EVIDENCE TO OVERCOME.** The defendant, as against his mother's administrator, claimed that certain money which he had loaned, and for which he held the notes payable to himself, was given to him by his mother, before her death, with the intention that it should be his absolutely. *Held* that the possession of the money by him, and the execution of the notes to him, raised a presumption of ownership in him, which was not overcome by the other evidence in the case, which consisted of declarations and statements of the mother in regard to her intentions with reference to the division of her property, even if such declarations were competent.

2. **Evidence: DECLARATIONS OF DECEASED PERSONS.** The law will not permit the declarations of a deceased person to be introduced in evidence in favor of his administrator, unless they were, when made, against his own interest.

Appeal from Cerro Gordo District Court.—HON. JOHN B. CLELAND, Judge.

FILED, DECEMBER 20, 1887.

ACTION in chancery to restrain defendant from disposing of certain promissory notes in his possession, and for the appointment of a receiver to hold the same pending the action, on the alleged ground that the notes are the property of the estate of which plaintiff is administrator, and that defendant is insolvent. A decree as prayed for by plaintiff was rendered. Defendant appeals.

Blythe & Markley, for appellant.

John Cliggitt, for appellee.

BECK, J.—I. The plaintiff is the administrator of the estate of Mary Horning, deceased. The plaintiff and defendant are both sons and heirs of the decedent.

The plaintiff, as the ground for relief, claims that certain promissory notes, payable to, and in the possession of, defendant, are the property of the estate, having been executed to defendant for money of the decedent, which, in her lifetime, he had received to be loaned, and, on loaning it, took the promissory notes and securities given therefor in his own name. Defendant maintains that the money loaned was his own; that he had received it from his mother in her lifetime as a gift, and that it was her purpose that it should become his property absolutely, free from any claim by her or her estate.

II. The only question in the case is one of fact, and involves the decision of the issue as to the ownership of the money for which the notes in controversy were given. If the money was given to defendant by his mother, as he claims, he is entitled to retain the notes; if not, they or their proceeds must be surrendered to plaintiff; or, if the notes have been paid, he must have judgment against defendant for the amount of the notes, with interest. Our inquiries, therefore, are limited to the one question,—did his mother give the money to defendant?

The evidence on neither side is wholly satisfactory, but, in our opinion, the preponderance is for defendant. In the first place the possession of the money by defendant, and the execution of the notes to him, raises a presumption of ownership in him. To overcome this presumption, plaintiff relies almost wholly upon declarations and statements made by the mother. They are to the effect that she intended to divide all of her property at her death between her children, retaining it for her own use as long as she lived; no declarations or statements to the direct effect that she had not given the money to the defendant, or that, after its receipt, it was held by him as her agent or for her use. If these declarations are to be regarded as a claim made by the mother to the property, not being against her own interest, but in support of it, they are not competent to defeat the adverse claim of defendant. We believe the rules

of the law will not permit declarations of a deceased person to be introduced in evidence, unless they were, when made, against his interest. 1 Greenl. Ev. sec. 147. Under our statute such is the rule as to witnesses. Code, sec. 3657. See *County of Mahaska v. Ingalls*, 16 Iowa, 81; *State v. Wooderd*, 20 Iowa, 541. But, as we have said, the declarations are almost wholly expressions of intentions and purposes to be executed in the future. If they should be regarded as competent evidence, they could not, in our opinion, overcome the presumption arising from the possession of the money by, and execution of the notes to, defendant. Intentions and purposes may be changed, and proof of their expression raises but a slight presumption against subsequent acts.

The evidence for defendant discloses frequent declarations of the deceased to the effect that she had given the money to defendant. In addition to this evidence, it appears that the decedent never made any claim to the notes, or the money for which they were given, to the person who made the loans and took the security for defendant, though it appears from plaintiff's evidence that she knew this person had made the loans, and that she had an interview with him before her death, in which she expressed a wish as to the disposition of her property. Other facts and circumstances tend to support defendant's claim of title to the notes. They need not be here mentioned, as their discussion would not be of profit to the parties or of interest to the profession.

The decree of the district court is reversed, and plaintiff's petition is dismissed.

REVERSED.

BOOT v. BREWSTER *et al.*

75	631
89	497
75	631
96	333
75	631
104	298
105	218
75	631
118	485
118	487

1. **Homestead:** ABANDONMENT: EVIDENCE. Defendant obtained a judgment against plaintiff, while the latter was occupying certain property as a homestead. Plaintiff afterwards went away, taking his family with him, for the purpose, as he testified, of earning a living for himself and family, and with the continuing intention of returning. Some furniture was left in the house, and never removed by him. The premises were so rented that the lessee was a tenant at will. Plaintiff, at least once, named a price which he would take for the property. Defendant had the premises sold on execution to satisfy his judgment. In an action to set aside the sale, *held* that defendant had the burden to show that the homestead had been abandoned; and that the long duration of plaintiff's absence, while entitled to consideration, was not sufficient, under the circumstances, to establish that fact.

2. ——— : TOWN PROPERTY : EXTENT : VALUE : EVIDENCE. In an action to set aside the unlawful execution sale of a homestead situated within a town plat, in which it appeared that it consisted of one acre of ground, *held* that the plaintiff had the burden to show that its value did not exceed five hundred dollars, in order to avoid the sale of the excess over one-half acre (Code, sec. 1996); but that his own testimony that he offered to take four hundred and fifty dollars for it was sufficient, in the absence of all other evidence as to its value.

3. **New Trial:** NEWLY-DISCOVERED EVIDENCE: SHOWING OF DILIGENCE. A new trial on the ground of newly-discovered evidence should not be granted upon a mere general showing that the affiant was unable to find or procure the evidence prior to the trial. There should be a showing of facts constituting diligence.

Appeal from Pottawattamie Circuit Court.

FILED, MARCH 6, 1888.

ACTION in equity to set aside the sale on execution of certain real estate, on the ground that the same was the homestead of the plaintiff. The relief asked was granted, and the defendants appeal.

Wright, Baldwin & Haldane, for appellant.

Stone & Sims, for appellee.

SEEVERS, C. J.—I. It clearly appears from the evidence that the plaintiff obtained title to the premises in controversy in 1880, and that he occupied the same as his homestead in November of that year, and so continued to occupy the same for the space of about three years thereafter. The defendant Brewster obtained, in 1882, a judgment against the plaintiff on an indebtedness contracted after the acquisition of the homestead. The material question, therefore, is whether there has been an abandonment of such homestead. The plaintiff and his family left the premises in controversy, and resided for a time at Carson, and at Kansas City, from which he returned to Carson. He did not acquire another homestead, but occupied rented property. While at Carson and Kansas City, he was engaged in business as a clerk, or some other capacity, in the employ of other persons. It clearly appears that he left his homestead for business purposes, and for the purpose of obtaining a support for himself and family. When he left the homestead, he left therein some household and kitchen furniture, which has remained in the house, or at least has never been removed by the plaintiff. Such homestead has been rented and occupied by others, but it was so rented that the lessee thereof was a tenant at will. At least one person made application to the plaintiff to purchase the property, and the plaintiff named a price he would take for it. The plaintiff testified that he left the homestead for a temporary purpose, and always intended to return. While such evidence of an intention to return cannot be regarded as conclusive, yet it is admissible, and entitled to consideration; and when it appears, as it does in this case, that the homestead was left for the purpose of obtaining a support for the family, it seems to us that an intent to abandon permanently the homestead should not be inferred, but rather an intent to return should be, as such intent must, it

1. HOMESTEAD: abandonment: evidence:

seems to us, always exist when the removal when made was for a temporary business purpose. If a person cannot obtain a living and occupy his homestead, for the time being, at least, he must of necessity temporarily abandon it, and such abandonment should not be regarded as permanent. A homestead, when acquired, will be presumed to continue until the contrary appears; the burden in this respect being on the general creditor (*First Nat. Bk. of Davenport v. Baker*, 57 Iowa, 197; *Bradshaw v. Hurst*, 57 Iowa, 745), and the defendants, as we think, have failed to establish such fact. The length of time the plaintiff has been absent from the homestead is entitled to consideration, but is not conclusive. *Dunton v. Woodbury*, 24 Iowa, 74. And yet this is practically the only circumstance relied on by the defendants, for, if the absence had been only for a few months, it is clear to our minds that the required abandonment could not be regarded as established. On the other hand, there is the fact that no homestead has been acquired, and that it was left for a temporary business purpose, as is indicated by the fact that furniture was left in the house, which has never been removed. Besides this, the judgment under which the defendant claims was obtained during the time the premises were occupied as a homestead, and it has been held in that case that proof of an intent to abandon the homestead should be clearer and more satisfactory than when the lien relied on was obtained after the homestead had ceased to be actually occupied as such. *Davis v. Kelley*, 14 Iowa, 523. No two cases are exactly alike, and no general rule can be established, but we think the facts in this case bring it within the rule established in *Fyffe v. Beers*, 18 Iowa, 14, and *Shirland v. Union Nat. Bk of Massilon*, 65 Iowa, 96.

II. The evidence tends to show that the homestead is within a town plat, and consists of one acre of land; and therefore it is insisted that, as to the excess of over one-half an acre, it cannot be exempt, for the reason that it is limited by section 1996 of the Code to that quantity,

2. —— : town property : extent : value: evidence.

unless the value is less than five hundred dollars. And it is contended that the burden is on the plaintiff to show such value, which we think is true. It is further contended that he has failed to establish such fact; but we think it sufficiently appears that the value of the homestead is less than five hundred dollars, for the reason that when the plaintiff was asked what he would sell it for, he said four hundred and fifty dollars. In the absence of any other evidence, this, under the circumstances, sufficiently establishes such value.

III. The defendants filed a motion for a new trial on the ground of newly-discovered evidence, which we think was properly overruled, for the reason that it does not sufficiently appear that the evidence could not have been obtained at the trial if due and proper diligence had been exercised. The affidavit on which a new trial was asked fails to state what, if any, diligence was used. It simply states, in substance, that the affiant was unable to find or procure the evidence prior to the trial. This is clearly insufficient. The efforts made in this direction, at least to some extent, should be stated.

8. New trial: newly-discovered evidence: showing of diligence.

AFFIRMED.

CLAPP v. SAUNDERS *et al.*

Mortgage: FRAUDULENT TITLE OF MORTGAGOR: GOOD FAITH OF MORTGAGEE. Where a wife held the legal record title to land, but held it in fraud of her husband's creditors, a mortgage made by her and her husband to a person who had no knowledge of the fraud, and taken by him in good faith and for a valuable consideration, was properly decreed to be a lien superior to a judgment against the mortgagors, rendered after the mortgage was executed and recorded, and superior to a sheriff's deed made on the sale of the land to satisfy such judgment.

Appeal from Cass District Court.—HON. H. E. DEEMER, Judge.

FILED, MARCH 7, 1888.

ACTION in chancery to foreclose a mortgage. There was a decree granting the relief prayed for in plaintiff's petition. Certain persons, other than the mortgagors, claiming an interest in the property, appeal.

John Hudspeth, for appellants.

R. G. Phelps, for appellee.

BECK, J.—I. The mortgage in suit was executed by Catharine and Timothy Saunders, husband and wife, to Cephas Clapp, to secure certain promissory notes amounting to forty-five hundred dollars, executed by the mortgagors to the mortgagee, and afterwards transferred to plaintiff. Joseph and John Saunders claim the lands mortgaged upon a sheriff's sale and deed under a judgment against the mortgagors, rendered after the notes were made and the mortgage was executed and recorded. By the decree of the district court, the mortgage was held to be a lien paramount to this sheriff's deed. The sole question in the case involves the correctness of this ruling.

II. The defendants, Joseph and John Saunders, insist that their sheriff's deed is paramount to plaintiff's mortgage, for the reason that the title of the land was conveyed to the mortgagor, Catharine Saunders, to defraud the creditors of her husband, Timothy. The facts upon which this claim is based are briefly these: Timothy originally owned these lands. He was largely indebted, and insolvent, and, in order to defeat his creditors, caused the lands to be sold upon an execution issued upon a judgment for a small sum, and to be purchased by one Breen, to whom a sheriff's deed was executed. He afterwards, without consideration, conveyed the lands to the wife, Catharine. The money paid upon the purchase of the lands at sheriff's sale was furnished by the husband; at least Breen furnished no part of it. It may be admitted that the transactions whereby the title of the lands was transferred from the husband to the wife were for the fraudulent purpose of defeating

his creditors. But the legal title, at the time the mortgage was executed, is shown to have been in the mortgagor, Catharine, by the duly recorded deed executed by the sheriff to Breen, and his deed to his wife, which was also recorded. The evidence shows that the mortgage was given to secure forty-five hundred dollars borrowed by the mortgagors of the mortgagee, Cephas Clapp, who transferred the notes to plaintiff. The mortgage was therefore given for a sufficient consideration. It is shown that the mortgagee, who is now dead, and the plaintiff were residents of Illinois, and that plaintiff never had been in Cass county, where the land is situated, and the mortgagors reside. The agents of the mortgagors, who negotiated the loan, testified to the effect that, so far as they know, the mortgagee had no knowledge or notice of the facts and transactions upon which the claim of fraud made by appellants is based. It is thus made to appear affirmatively that the plaintiff and the mortgagee acquired the notes and mortgage for a valuable consideration, and in good faith.

III. Counsel for appellants insist that the burden rests upon plaintiff to show that she or the mortgagee acquired the mortgage without notice of the fraud of the mortgagors. If, for the purposes of the case, this position be admitted, the facts we have just recited show, *prima facie*, at least, the good faith of plaintiff and the mortgagee, and that they had no knowledge or notice, actual or constructive, of the fraud. Appellants make no proof tending to show such notice, or the *mala fides* of these parties. Plaintiff, being regarded as a good-faith holder of the notes and mortgage for a valuable consideration without notice of the fraud, holds the notes and mortgage without any taint or infirmity arising therefrom. The mortgage must therefore be regarded and enforced as paramount to the appellants' title.

AFFIRMED.

75 637
95 405

75 637
104 531

75 637
133 631

THE STATE v. WARD *and Certain Intoxicating Liquors.*

1. **Intoxicating Liquors:** ILLEGAL SALES BY PHARMACIST UNDER PERMIT: SEARCH-WARRANT. A pharmacist who has a permit to sell intoxicating liquors, but who sells them for purposes other than the legitimate and actual necessities of medicine, is subject to the utmost rigors of the laws relating to the unlawful sales of such liquors (Chap. 83, Laws of 1886), and his liquors may be seized under a search-warrant, as provided by section 1544 of the Code.

2. ———: SEARCH-WARRANT: SEIZURE BEFORE RECEIPT OF WARRANT: LEGALITY OF SUBSEQUENT PROCEEDINGS. An officer seized certain intoxicating liquors before any warrant therefor came into his hands, but he afterwards received a warrant which would have justified the seizure, and under it the liquors were retained, and, upon further proceedings, the owner appeared and defended, but the liquors were condemned. *Held* that, while the officer may have been guilty of a trespass in the first instance, that fact did not affect his right to hold the liquors after he received the warrant, nor the right of the court to proceed in all respects as if no trespass had been committed.

3. ———: ———: LIQUORS NOT IN DEFENDANT'S CUSTODY. It is no valid objection to the seizure and condemnation of liquors under a search-warrant, that they are not, when seized, in the custody of the person who afterwards appears and claims to be their owner, even though he be a registered pharmacist with a permit to sell such liquors.

4. ———: PHARMACIST WITH PERMIT: SEARCH-WARRANT PROCEEDINGS: RIGHT OF STATE TO APPEAL. Where the intoxicating liquors of a pharmacist holding a permit to sell were seized under a search-warrant, and it was proved (upon an appeal to the district court) that he made sales of such liquors to persons in the habit of becoming intoxicated, and the court instructed the jury, upon such proof, to find a verdict for the defendant, *held* that such instruction was erroneous, as matter of law, and that the state had a right to appeal to this court, under section 4539 of the Code, for the purpose of obtaining a "correct exposition of the law."

5. ———: ———: UNLAWFUL SALES: GUILTY KNOWLEDGE. A pharmacist with a permit to sell intoxicating liquors cannot escape liability for selling to a person in the habit of becoming intoxicated, on the ground that he was ignorant of such habit. (Compare *Dudley v. Sautbine*, 49 Iowa, 650; Code, sec. 1539; Laws of 1886, chap. 83).

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, MARCH 8, 1888.

AN information was filed before a justice of the peace, stating that certain intoxicating liquors were in a certain car of the Wabash Railroad Company, consigned to Hulbert, Hess & Co., and that they intended to sell the same in violation of law. A warrant was issued by the justice, and the liquors were seized by a constable, who made return of such fact to the justice. Notices were posted and given, as required by law, and, upon the day fixed for the hearing, the defendant, C. H. Ward, appeared and claimed that he owned the liquor, and he was made defendant. He pleaded not guilty, and a trial was had. Judgment was rendered by the justice condemning the liquor, and ordering it to be destroyed; whereupon the defendant appealed to the district court, where there was a trial before a jury. At the conclusion of the evidence introduced by the state, the defendant moved the court to instruct the jury to find for the defendant, on the ground that the state had failed to introduce sufficient evidence to warrant a conviction. This motion was sustained, the jury so instructed, and a verdict in accordance therewith returned; and the state appeals.

Baker, Bishop & Haskins, for appellant.

Cole, McVey & Clark, for appellee.

SEEVERS, C. J.—I. It is conceded that the defendant is a registered pharmacist, and that he had been granted a permit, as provided in chapter 83, Laws 1886, to sell liquors as and for medicine, and therefore counsel for the appellee contend that the liquor in question was not subject to seizure. Said chapter 83 provides "that nothing herein contained shall be so construed as to shield the person who in anywise abuses this trust, for the legitimate and actual necessities of medicine only,

1. INTOXICATING liquors: illegal sales by pharmacist under permit: search-warrant.

from the utmost rigors of the law, now or hereafter in force, relating to intoxicating liquors." It is further provided in said chapter that a pharmacist can "sell intoxicating liquors for the actual necessities of medicine only." To do this he must obtain a permit, which is a personal trust reposed in the pharmacist. If liquor is sold for any other purpose than medicine which is actually necessary as such, the permit ceases to protect the pharmacist, and he is liable to the utmost rigors of the law in force at the time the unlawful sale is made. In determining the contention of counsel, it must be assumed that the defendant sold liquors for purposes other than as medicine, and, this being so, it necessarily follows that search may be made for and the liquor seized, which is owned by a pharmacist, as provided in section 1544 of the Code. If unlawful sales are made, it follows that the liquor is kept for an unlawful purpose, and a search-warrant may be obtained and the liquor seized, for the reason that the statute expressly so provides.

II. When the constable entered the car he had no warrant, and he seized the liquor therein, and removed a portion of it on a dray near the car before the warrant was placed in his hands; and it is insisted that no search or seizure can be lawfully made, without first procuring a warrant authorizing it to be done. It is said, in the first place, that a search and seizure without a warrant cannot be made, because it is provided in section 8, article 1, of the constitution that the right of the people to be secure in their persons, papers and effects, against unreasonable searches, shall not be violated. This question was considered in *Santo v. State*, 2 Iowa, 165, and it was held that the statute was constitutional. The only difference between that case and this is that in the former the officer had in his possession a warrant when the search and seizure was made; and it seems to us that, while the officer in this case may have been guilty of a trespass, yet, as the statute is constitutional, and it must be assumed, in the discussion of this question

2. ——: search-warrant: seizure before receipt of warrant: legality of subsequent proceedings.

that the liquor was kept and used for an unlawful purpose, and as a warrant was in fact procured, under which the officer had the custody of the liquor, the fact that the search and seizure may have been illegally made in the first instance would not authorize the court in directing the jury to find for the defendant; and especially is this true when the court was not asked to and did not proceed on this ground. There is a class of cases which, it is said, hold that where a person is by force, artifice or fraud brought into the jurisdiction of the court, he cannot be prosecuted for a crime when jurisdiction is thus obtained. There is a clear distinction between those cases and this. Here the liquor was within the jurisdiction of the court, and the defendant voluntarily appeared. No force, artifice or fraud was used to compel him to do so. It must be remembered that, if the liquor was brought into the state for any unlawful purpose, it was, under the statute, liable to be seized and condemned, and it is immaterial who had possession thereof when the warrant was placed in the hands of the constable; for under it the officer could lawfully seize the liquor.

III. It is further said that the liquor was not in the actual custody or possession of the defendant when it was seized by the officer. This is immaterial for the reason that, unless it was lawfully in the state, it was liable to be seized and condemned; and it was not lawfully here, unless the defendant had a permit which authorized him to own and keep liquors. It is true the defendant had such a permit; but this did not protect it from seizure if it was brought here for the purpose of being unlawfully sold.

3. —— : ——: liquors not in defendant's custody.

IV. It is provided by statute that an appeal may be taken to the supreme court only for the purpose of obtaining a "correct exposition of the law" (Code, sec. 4539); and it is claimed that this appeal involves only a question of fact, and therefore the erroneous decision of the district court cannot be corrected, conceding

4. —— : pharmacist with permit: search-warrant proceedings: right of state to appeal.

it to be such. For the reasons hereafter stated, we think the question involved in this appeal is one of law and not of fact.

V. The plaintiff introduced evidence showing that, on January 15, 19 and 28, 1887, the defendant sold to one Folsom one-half gallon of whiskey; and, on the second and twenty-second days of February, he sold to Folsom one quart of whisky; and, on the twenty-second of said month, he sold to said Folsom one-half gallon of whisky. The state also introduced evidence showing that, on January 27, 1887, the defendant sold one Henderson one-half gallon of whisky; and on the eleventh, twelfth, fifteenth, sixteenth, seventeeth, eighteenth, nineteenth, twenty-fourth and twenty-sixth of February, he sold Henderson one-half gallon of whisky; and, on the twenty-third of said month, the defendant sold Henderson one-half gallon of whisky on two different occasions. The state also proved that neither Folsom nor Henderson had a permit authorizing them to sell intoxicating liquors, and that they both were in the habit of becoming intoxicated. The whisky was obtained upon written or printed applications therefor. There was no evidence introduced contradictory to that introduced by the state. The liquor was seized by the constable on the eleventh day of February, 1887. Chapter 83, Laws 1886, provides that a pharmacist holding a permit "shall not accept an application (for intoxicating liquor) from a minor, or person in the habit of becoming intoxicated." This means that the pharmacist shall not sell intoxicating liquor to such a person. Section 1539 of the Code provides that it shall be unlawful for any person to sell "intoxicating liquor to any minor, * * * or any person who is in the habit of becoming intoxicated." Under this last statute it was held in *Dudley v. Sautbine*, 49 Iowa, 650, that the seller was not excused from liability by his ignorance of the fact that the person to whom he sells is in the habit of becoming intoxicated. It follows, therefore,

5. ——: ——: unlawful sales: guilty knowledge.

that the state was not required to prove such knowledge on the part of the seller. As there is no substantial difference between the provisions of chapter 83 and section 1539 of the Code, it follows that both should be construed alike. Both of these statutes make the sale the only thing requisite to the conviction of the seller. Guilty knowledge, or the intent and purpose of the seller, is immaterial, because the provision is that the pharmacist shall not sell to a person in the habit of becoming intoxicated. Whether a sale can be made to such a person for the actual "necessities of medicine," we have no occasion to determine, for the reason that, under the most favorable view that can be taken for the defendant, that was a question for the jury to determine. We therefore are of the opinion that the district court erred in directing the jury to find for the defendant.

REVERSED.

ADAMS COUNTY v. GRAVES.

75 642
87 328

1. **Appeal**: TRIAL DE NOVO: CERTIFICATION OF EVIDENCE. Where the trial judge, at the trial term, certified to the short-hand reporter's notes as containing all the evidence introduced and offered, together with objections and rulings thereon, and exceptions of parties; and the reporter, within six months, filed in the clerk's office a duly certified translation of his notes, with a transcript of the judge's certificate, *held* that the evidence was sufficiently certified to authorize a trial *de novo* in this court. (Compare *Merrill v. Bowe*, 69 Iowa, 653).

2. **Former Adjudication**: SWAMP-LAND CONTRACT: VALIDITY: TITLE UNDER. The plaintiff brought an action to secure a decree annulling a contract for the conveyance of its swamp lands and indemnity swamp lands, and its swamp-land scrip, to the American Emigrant Company; but the court dismissed plaintiff's petition, without prejudice to its right to sue said company for breach of the contract. (See *Am. Em. Co. v. Adams County*, 100 U. S. 61). *Held* that this was an adjudication that the contract was valid and binding, and that such adjudication was a bar to this action, by the same plaintiff, against a grantee of the said company, to divest the latter of his equitable title to land included in said contract.

8. **Statute of Limitations**: DOES NOT BAR EQUITABLE DEFENSE. A defendant, in an action to quiet title, may plead and rely upon his equitable title as a defense to the relief asked, even though, on account of the lapse of time, he could not plead such title as ground for affirmative relief.

4. ———: TITLE TO WILD LAND. Defendant's equitable title to the land in question, which was derived from plaintiff, arose more than ten years prior to the year 1888, but the land was during all that time wild and unoccupied. In that year, however, defendant took possession and made improvements, and soon thereafter this suit was begun to quiet title against him. *Held* that his right to have his equitable title quieted, upon a proper cross-petition for that purpose, was not barred by the statute of limitations.

Appeal from Crawford District Court.—HON. C. F. LOOFBOUROW, Judge.

FILED, MARCH 8, 1888.

ACTION at law to recover possession of certain real estate. The defendant denied the allegations of the petition, and pleaded an equitable defense, and made the answer a cross-petition, and asked that the title to the land be quieted in him, and that the plaintiff be estopped from claiming title. A prior adjudication was also pleaded. The defendant replied to the cross-petition. The cross-petition was dismissed, and the plaintiff adjudged to be the owner of the real estate, and entitled to the possession thereof. The defendant appeals.

Barcroft & Bowen and *J. J. Davis*, for appellant.

F. M. Davis and *Shaw & Kuehnle*, for appellee.

SEEVERS, C. J.—I. Counsel for the appellee insist that this cause cannot be tried *de novo*, for the reason that the evidence has not been properly certified. It is stated in an amended abstract filed by the appellant that the following certificate was attached to the short-hand notes at the term at which the cause was tried:

1. APPEAL: trial de novo: certification of evidence.

"In the District Court of Crawford County, Iowa.
October Term, 1886.
"Adams County *vs.* Abner Graves.
"State of Iowa, Crawford County, ss. I hereby

certify that the foregoing record contains all the evidence introduced and offered on the trial of the case of Adams county *vs.* Abner Graves, tried at October term, 1886, of the district court of Crawford county, Iowa (except the depositions and exhibits offered, to which correct reference is herein made), together with all objections made to the introduction of evidence, rulings of the court thereon, and exceptions of parties thereto; and the same is hereby signed by me, and certified, and ordered filed, and made a part of the record in this case.

"Signed this fourth day of November, 1886.

"C. F. LOOFBOUROW, Judge."

The foregoing is followed by a certificate of the reporter attached to the short-hand notes as extended by him, that such extension or translation is full, true and complete, together with the certificate of the judge above set out. Such translation and certificate were duly filed in the clerk's office within six months after the trial. The judge certified to the short-hand notes, and the reporter's certificate to the translation is a sufficient identification of the evidence introduced or offered on the trial (*Merrill v. Bowe*, 69 Iowa, 653), and therefore the parties are entitled to a trial anew in this court.

II. The plaintiff claims title to the land in controversy under the swamp-land grants made by congress to the several states, and the defendant under the American Emigrant Company, and he claims that, under a certain contract and conveyance made by the plaintiff with and to said company, and an adjudication made by the supreme court of the United States declaring the contract to be valid and binding, the plaintiff in equity is not entitled to recover in this action. It is not deemed necessary to state at length the congressional and state legislation, further than to state that thereunder the swamp lands in Adams county, and money and indemnity scrip granted in lieu thereof, were thereby vested in the plaintiff. In 1862, a contract was entered into between the plaintiff and said company in relation to said lands; and in 1863, in

2. FORMER adjudication: swamp-land contract: validity: title under.

pursuance of said contract, the plaintiff conveyed to said company all swamp lands in the county; and said conveyance further provides that "any lands that shall be located under or by any scrip, so called, which may be obtained on said claim," the county will convey to the said company on reasonable request. The lands in controversy were located or entered with indemnity scrip obtained from the United States under the swamp-land grants. In 1864 the plaintiff commenced an action in the state courts, and the relief asked was the rescission of said agreement and conveyance. This cause was transferred to the circuit court of the United States, and in such court the plaintiff filed an amended and substituted petition, asking the same relief as above stated, on several grounds; and in the reply to the cross-petition the plaintiff pleads and relies on substantially the same matters as defenses to the equitable defense pleaded by the defendant in this action. In the substituted petition in the circuit court of the United States the plaintiff alleged and stated that the plaintiff's board of supervisors had entered into said contract, and executed the conveyance, and that the said "acts on the part of said board of supervisors, if legal and valid, operated to divest the plaintiff of all claim and ownership, right and control of any of said lands or funds and claims, and obligated plaintiff to convey to defendants large sums of money and large quantities of land-scrip and land, as aforesaid." Issue was joined in said action, and the relief asked by the plaintiff was granted, but, on appeal to the supreme court of the United States, the judgment of the circuit court was reversed. *American Emigrant Co. v. County of Adams*, 100 U. S. 61. In accordance with the opinion and mandate of the supreme court, a final decree was entered in the circuit court dismissing "complainant's bill of complaint * * * at complainant's costs, without prejudice to the right of the county to bring an action at law for breach of the terms of the contract." Counsel for the appellant insist that this adjudication determines

that the contract and conveyance are valid, and therefore, although the legal title to the lands in controversy is vested in the county, the latter in equity is not entitled to recover, for the reason that the equitable title to said lands is vested in the defendant; and this position must, we think, be sustained. The dismissal of the action undoubtedly amounts to an adjudication that the contract and conveyance are valid obligations binding on the parties. The final decree shows that such must be the case, for it reserves to the plaintiff the right to bring an action for damages under the contract. Instead of doing this, the plaintiff in this action seeks to repudiate the contract and conveyance, and affirms their invalidity. A decree dismissing a bill in chancery absolute in terms, unless made on grounds not going to the merits, is a bar to further litigation on the same subject between the same parties; and this is true as to all questions involved which might have been raised. *Durant v. Essex Company*, 7 Wall. 107; *Aurora City v. West*, 7 Wall. 82. It is useless to multiply authorities on this question, for the well-settled rule is that a controversy once decided by a competent tribunal cannot be reëxamined by another court having concurrent jurisdiction, in a suit between the same parties of their privies. The contract and conveyance must therefore be regarded as valid obligations, and therefore the plaintiff is not entitled to recover, if the lands in controversy are embraced therein, and as to this we have no doubt. In substance, the emigrant company obtained all lands, money and indemnity scrip to which the plaintiff was entitled under the swamp-land grant. It will be observed that the plaintiff so averred in the action in the federal court.

But the plaintiff insists that the defendant is not entitled to the affirmative relief asked by him, because the same is barred by the statute of limitations. If this be conceded, the defendant may still plead and rely on his equitable title as a defense to the relief asked by the plaintiff. *Warren v. Crew*, 22 Iowa, 315. We, however,

8. STATUTE of limitations: does not bar equitable defense.

think that the defendant is entitled to the relief asked by him. As we understand, the land was wild and unoccupied until in April or May, 1883, when the defendant entered into possession, erected a house, and broke a portion of the land. It seems to us that such possession, and the equitable title, entitles the defendant to a decree confirming and quieting his title. REVERSED.

4. ——: title to wild land.

THE DISTRICT TOWNSHIP OF SIDNEY v. THE DES MOINES INSURANCE COMPANY.

Fire Insurance: NOTICE AND PROOF OF LOSS: TIME OF GIVING: PLEADING. A petition in an action upon a policy of fire insurance stated that the loss occurred "on or about April 14, 1886," and that notice and proof of such loss were given "on or about June 19, 1886." *Held* that the petition did not show that more than sixty days intervened between the loss and the notice and proof thereof; but that, by the use of the words "on or about," it was indefinite as to that, and was not, therefore, bad on demurrer, under chapter 211, Laws of 1880.

Appeal from Fremont District Court.—HON. GEORGE CARSON, Judge.

FILED, MARCH 9, 1888.

ACTION on a policy of insurance against loss or damage by high winds or tornadoes. There was a demurrer to the petition, which was overruled, and the defendant appeals.

Cole, McVey & Clark, for appellant.

Geo. E. Draper, for appellee.

SEEVERS, C. J.—The petition states that the loss occurred "on or about the fourteenth day of April, 1886," and that "on or about June 19, 1886, notice and proof of loss were given to the defendant at the office in

Des Moines, Iowa." The defendant demurred to the petition, upon the ground that notice and proof of loss were not furnished until more than sixty days after the loss had elapsed. Counsel for the appellant insist that under the provisions of chapter 211, Laws 1880 (Miller's Code, 299), the plaintiff is not entitled to recover unless the proof of loss was furnished the defendant within sixty days after the loss occurred, and it is further insisted that such fact appears on the face of the petition. On the other hand, counsel for the appellee contends that such fact does not appear on the face of the petition, and we think the position of counsel for the appellee must be sustained. The petition is indefinite and uncertain; but this is not the ground of the demurrer. The word "on" is limited or qualified by the word "about," which means in the "proximity of," or "near to," and this is what the words, taken together, as used in the petition, mean. It may be assumed that the pleader was uncertain as to either date, and therefore stated the time of each in the alternative. It seems to us that the petition, on its face, does not state that the notice of loss was not given the defendant until sixty days had elapsed after the loss. More or less than that period may have elapsed, and because the petition is indefinite in this respect, it was not obnoxious to the demurrer. AFFIRMED.

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POLK COUNTY v. NELSON *et al.*

THE STATE v. THE SAME.

1. **Judgment**: LIEN AFTER CANCELLATION. Where notes are taken for the amount of a judgment, and the judgment cancelled, there is no longer any judgment, nor any lien on real estate by virtue thereof.

2. ——— : ——— : DURATION OF. A judgment ceases to be a lien on real estate after ten years from the date of its rendition. (Code, sec. 2882).

8. **Appeal: TRIAL DE NOVO: DEFECTIVE ABSTRACT.** The certificate of the trial judge that the record contains all the evidence introduced and offered is not sufficient to authorize a trial *de novo* in this court, where the abstract fails to state that *it* contains all the evidence contained in the record.

Appeals from Polk District Court.—HON. W. F. CONRAD, Judge.

FILED, MARCH 9, 1888.

ACTION in equity to subject certain real estate, the title to which is in the defendant Emma Nelson, to the payment of certain judgments against the defendant Daniel Nelson. Judgment for the defendant, and the plaintiffs appeal.

M. D. McHenry, for appellants.

W. S. Sickmon, for appellee.

SEEVERS, C. J.—I. These actions were consolidated and submitted on a single record. The material facts in the first are as follows: The defendant Daniel Nelson obtained title to the real estate in controversy in 1875, and remained the owner thereof until 1879. In 1877, the state of Iowa recovered a judgment against him for five hundred dollars in a criminal proceeding. In 1881, he was, by virtue of process issued on said judgment, committed to jail, and made a schedule of his property, executed his notes for the amount of the judgment, and was released from jail. In 1882, this judgment was cancelled by the order and direction of the district court. Notwithstanding this fact, as we understand, counsel for the plaintiffs insists that the judgment became a lien on the real estate in controversy, and that such lien continues to exist. But this cannot be so. When the judgment was cancelled it ceased to exist, and as there was no judgment there was no lien. It is not sought in this action to set

1. JUDGMENT: lien after cancellation.

aside the cancellation, nor is it claimed it was fraudulently obtained. The plaintiff in the first action obtained a judgment on the notes above mentioned in 1884, and the conveyance of the real estate to Emma Nelson is sought to be set aside, and the same subjected to the payment of said judgment, on the ground that the title to the real estate was conveyed to said Emma for the purpose of defrauding the creditors of Daniel Nelson. This claim will be hereafter considered.

II. In December, 1873, the plaintiff in the second action recovered a judgment against Daniel Nelson which, it may be conceded, became a lien on the real estate in controversy. The action to enforce such lien was commenced in 1886, but prior to that time the lien ceased to exist, it being provided by statute that judgment liens on real estate exist for the period of ten years only from the date of the judgment. Code, sec. 2882. It follows, therefore, that when this action was commenced the judgment referred to had ceased to be a lien on the real estate.

2. —: —: duration of.

III. The only remaining question is whether the plaintiffs can, in this consolidated action, subject the real estate to the payment of either of said judgments upon the ground that the title thereto was vested in Emma Nelson for the purpose of defrauding the creditors of Daniel Nelson. The defendants denied all fraud, and pleaded that at all times the real estate constituted the homestead of defendants, and therefore at no time could it be subjected to the payment of said judgments. Counsel for the appellee also insists that it does not appear on the face of the abstract that the evidence introduced in the district court is contained therein, and this position must be sustained. There is no statement in the abstract that it contains all the evidence, nor is the certificate of the judge attached, as is required by section 2742 of the Code. But he did sign a bill of exceptions, which recites the evidence introduced; and following such recital is a statement that the "foregoing is all the evidence offered in the

3. APPEAL: trial de novo: defective abstract.

case." Conceding that this bill of exceptions is equivalent to the required certificate, it may be further conceded that all the evidence offered and introduced below is correctly and fully stated therein. But the difficulty is, how can we say that all the evidence referred to in the bill of exceptions is correctly set out or sufficiently referred to in the abstract, in the absence of any statement to that effect? It has been repeatedly held that it must appear on the face of the abstract that all the evidence is contained therein in order to entitle the appellant to a trial anew in this court; and as this fact does not appear, we are unable to consider and determine any controverted question of fact in the case. Errors have been assigned which, however, only challenge the correctness of the facts found by the court. It follows, therefore, that the judgment of the district court must be

AFFIRMED.

AMOS v. BUCK.

1. **Evidence:** ADMISSION OF SECONDARY: ERROR CURED. An error in admitting secondary evidence is cured where the same point is afterwards established by the primary evidence.

2. **Instructions:** TO BE CONSTRUED TOGETHER: EXAMPLE. In an action upon an award, the agreement to submit to arbitration and the award of the arbitrators were admitted in the answer, and the court had distinctly instructed the jury to that effect. But, in introducing another instruction in regard to the real issues, the court said: "If you find from the evidence that the plaintiff and defendant agreed to submit their differences to arbitration, and if you find such award was made as agreed," etc. *Held* that the jury could not have understood that the execution of the agreement and the making of the award were in issue, and that they were to find thereon.

3. ———: TO BE CONSTRUED IN LIGHT OF ISSUES AND EVIDENCE: EXAMPLE. In such action, the court instructed the jury to find for defendant if they found that the award did not include all the differences in dispute between the parties at the time of the alleged award. *Held* not erroneous as not being limited to matters of dispute which were submitted to the arbitrators; because the pleadings and evidence showed that there were no other matters in issue, and the jury could not have been misled.

4. ———: SUBMITTING QUESTION OF WAIVER WITHOUT DEFINITION. In such action, the question as to whether defendant waived his right to be present at the hearing was submitted to the jury without defining what would constitute a waiver. *Held* no error, where the waiver, if any, was a direction of the defendant to the arbitrators to proceed in his absence.

Appeal from Page District Court.—HON. GEORGE CARSON, Judge.

FILED, MARCH 9, 1888.

THIS action is founded upon an award made by certain arbitrators upon a written agreement, signed by plaintiff and defendant, by which all matters of difference between them were submitted to said arbitrators. There was a trial by jury, which resulted in a verdict and judgment for the defendant. Plaintiff appeals.

G. B. Jennings and *W. W. Morsman*, for appellant.

James McCabe, for appellee.

ROTHROCK, J.—The agreement for arbitration was as follows: "We, the undersigned, hereby mutually agree to submit all our matters of difference, of every name and nature, to the award and determination of I. G. Burnet, W. N. Maloney and H. I. Foskett, of Page county, Iowa, for them to hear and determine the same, and make their award in writing as soon as they can, but not before August 1, 1886; and said award to be filed by them in the Commercial Bank of B. M. Webster, Essex, Iowa." The award made in pursuance of the agreement and upon which the suit is founded, is as follows: "Essex, Iowa, October 8, 1886. T. B. Amos *vs.* Joseph Buck. We, the undersigned, arbitrators in the above-entitled cause, find from the evidence submitted to us that said defendant is at present indebted to plaintiff in the sum of three hundred eighty-two dollars and forty cents." The answer of the defendant was a denial of the right of recovery upon the award, upon the ground

that the hearing was had and conclusion reached by the arbitrators without giving the defendant an opportunity to appear and be heard in his own behalf, and that the arbitrators failed to examine all the matters of difference between the parties; that they acted on a single transaction between the parties, and did not consider other transactions necessary to be examined and passed upon in order to ascertain and determine the true condition of affairs between them.

By an amendment to the answer, the defendant averred that the award was procured by the fraud of the plaintiff and his attorneys, in inducing the arbitrators to hear said cause without reasonable notice to the defendant, and upon unsworn statements of the plaintiff and his brother. Without detailing the evidence here, it is sufficient to say that we think the jury were fairly warranted in finding that the hearing was had, and the award made, without giving the defendant reasonable notice thereof, so that he could attend and prove up his claims against the plaintiff in a proper manner; and it may also be fairly found, from the evidence, that the arbitrators considered but one claim in dispute between the parties, when there were other claims of the defendant in their hands which were not considered, because the defendant was not present to testify thereto, and that the award was made up without giving the defendant a reasonable opportunity to substantiate said claims.

I. The appellant complains because the court permitted the defendant to testify to a conversation between him and William Maloney, one of the arbitrators, to the effect that the award was made upon one draft, and that he (Maloney) knew the defendant would not stand any such an award as that. It is possible that this was secondary evidence of what occurred at the hearing, and as to what was considered in making up the award. But we think it was without prejudice, because Maloney was examined as a witness in behalf of the defendant, and afterwards in behalf of the plaintiff, and he testified

1. EVIDENCE: admission of secondary: error cured.

to substantially the same facts which he related in his conversation with the defendant.

II. It is urged that the fourth instruction given by the court to the jury is erroneous. It is in these words:

2. INSTRUCTIONS: to be construed together: example.

"If you find, from the evidence, that the plaintiff and defendant agreed to submit their differences to arbitration, and if you find such award was made as agreed, you should find for plaintiff for the amount found by the arbitrators in such matter, unless you further find—(1) that said award does not include all the differences in dispute between plaintiff and defendant at time of the alleged award; or (2) that defendant was not accorded a reasonable notice of the time of the hearing." This instruction is said to be erroneous, in that it submits to the jury the question whether there was an agreement to arbitrate, and an award made thereon. Of course, the jury had nothing to do with the question as to the execution of the agreement and the award. They were admitted by the answer, and the court had distinctly directed the jury, in a previous instruction, that they were admitted by the defendant. The jury surely could not have understood from this instruction that the question of the execution of the agreement to arbitrate, and the fact that an award was made, were in issue.

It is further claimed that the instruction is erroneous because the jury were directed to find for the defendant, if they found from the evidence that the award did not include all the differences in dispute between the parties.

3. ——: to be construed in light of issues and evidence: example.

It is said that the instruction should have been limited to all matters of dispute which were submitted to the arbitrators by the parties. Instructions must always be considered with reference to the evidence in the case. The defendant did not complain of the award because the arbitrators failed to consider claims which he did not present. The evidence tends to show that he gave his claims to one of the arbitrators before the hearing, and the instruction could have been understood by the jury in no other way than that the

disputed claims meant such matters as had been presented to the arbitrators.

Other objections are made to the instructions to the jury. One is that the question as to whether the defendant waived his right to be personally present at the submission was submitted to the jury without defining what would constitute a waiver. There was no error in this; it was a simple fact, to be determined by the jury from the evidence, whether the defendant directed the arbitrators to hear the case and make the award in his absence.

4. ——: submitting question of waiver without definition.

We find no error, and the judgment will be

AFFIRMED.

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CASEY v. TAMA COUNTY.

1. **Bridges**: WHAT IS COUNTY BRIDGE: TWO BRIDGES CONNECTED BY GRADE: QUESTION FOR JURY. The defendant county built a bridge fifty feet long, resting on stone abutments, over a stream, and another bridge thirty-six feet long, also resting on stone abutments, over an arm or bayou of the same stream. These bridges were a part of the same public highway, and were only twenty feet apart, and the intervening portion of the highway was graded up to the common level of the bridges. In an action for injuries occasioned by a defect in the shorter bridge, *held* that it was error for the court to hold, as matter of law, that the shorter bridge was not a county bridge because it was not forty feet in length (Code, sec. 527); but that it was a question for the jury whether the two bridges did not in fact constitute, with the intervening grade, one structure, for negligence in regard to which the county would be liable.

2. ——: ——: LIMIT OF FORTY FEET. Viewed in the light of the settled policy of the state, and of the public interest, and of other provisions of the statute (Code, secs. 303, 990, 994), the proper meaning of section 527 of the Code is that it fixes absolutely the liability of counties for public bridges, over streams crossing state and county highways, which exceed forty feet in length, and that their liability for constructing and maintaining bridges forty feet or less in length is not affected by said section, but depends upon the necessity and importance to the public of each bridge, its character and cost, and the financial ability of the road-district in which it is situated to construct and maintain it.

3. ——— : ——— : WHETHER ON PUBLIC HIGHWAY : QUESTION FOR JURY. In an action for an injury by reason of a defective bridge, there was evidence tending to show that the highway on which the bridge was located, including the crossing at the bridge, had been used by the public, and worked by the road supervisor, and improved by the defendant county, for more than twenty years. *Held* that it was error for the court to determine, as matter of law, that the bridge was not located on a public highway, but that the question should have been submitted to the jury.

4. ——— : ——— : LOCATION OUTSIDE OF COUNTY : QUESTION FOR JURY. Under chapter 40, Laws of 1878, a county may have a bridge outside of its own limits, for whose maintenance it may be liable. And where the evidence established acts of the defendant tending to show its recognition of its liability for the maintenance of the bridge in question, though just outside of its own limits, the question of its liability should have been submitted to the jury.

Appeal from Benton District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, MARCH 10, 1888.

ACTION to recover damages for personal injuries caused by an alleged defective bridge on a public highway. After both parties had introduced their evidence, the district court sustained a motion to instruct the jury to return a verdict for defendant. A verdict was returned in accordance with this ruling, a motion for a new trial was overruled, and judgment rendered against plaintiff for costs. The plaintiff appeals.

Struble & Stiger and *J. D. Nichols*, for appellant.

Chas. A. Clark and *J. R. Caldwell*, for appellee.

ROBINSON, J.—I. The first question raised for our consideration is the liability of a county for a structure of the length and character of that in controversy. The evidence tends to show that it was built by defendant in 1874 over an arm or bayou of Big creek. It rested on stone abutments, and was not less than thirty-six, nor more than forty, feet in length. Some twenty feet south of this, and in the same line of road,

1. BRIDGES: what is county bridge: two bridges connected by grade: question for jury.

was the north end of a bridge-span over the main stream. This was fifty feet long, and also rested on stone abutments. The span between the two spans was filled up to their level with stones and earth to a height, in places, of eight or ten feet. The two spans and connecting grade formed a means of crossing Big creek on the line of the road used as a public highway. The evidence tends to show that defendant built the structure over the main stream about the year 1870, and replaced it with another in 1883; that it built the structure over the bayou in 1874, and in 1879 placed piling under each end of the span; that defendant has at all times since 1870 assumed the duty of maintaining these structures. The cost of the longer one was about nine hundred dollars, and of the other about five hundred dollars. On or about July 1, 1884, the plaintiff, in crossing the stream with a team of horses and loaded wagon, drove onto the shorter span. It gave way, and plaintiff was precipitated to the water below, with his load and portions of the structure, resulting, as he alleges, in serious injuries to himself. One of the grounds of the motion to instruct the jury to return a verdict for the defendant is as follows: "The evidence shows, without controversy, that the bridge in question was less than forty feet in length, and was not a county bridge." The motion was sustained as to this, as well as to all other grounds. It is contended by plaintiff that the structure which fell, if not constituting a county bridge of itself, was at least a part of such a bridge, and hence that the district court erred in sustaining the motion on the ground named. The court below must have found that, as a matter of law, no bridge not exceeding forty feet in length can be a county bridge, and that the structure in question was neither a county bridge nor any part of one. In this we think there was error. We have held that a so-called approach might properly be considered a part of the bridge to the proper use of which it was essential. *Moreland v. Mitchell County*, 40 Iowa, 397; *Albee v. Floyd County*, 46 Iowa, 178. In

this case it appears that the span over the bayou was on substantially the same level as that over the main stream; that it was necessary to allow a free and proper flow in time of high water; that it was made much like the main span; that each was designed for use in connection with the other; and that neither could have been used without the other. They were joined together as a continuous whole, and, as such, formed a single passage-way over the stream. We do not think it can be said, as a conclusion of law, that their separation by a few feet of earth made them independent of each other; on the contrary, the jury might have found that all together formed but a single bridge. This was a question of fact, and not of law, and should have been submitted to the jury for their determination.

II. But in case the jury should find that the structure in controversy was complete in itself, and not more than forty feet in length, could it be considered a county bridge in that event, under the facts which the evidence tends to prove? Defendant contends that this question must be answered in the negative, and relies upon section 527 of the Code in support of its position. The portion of that section material to the present inquiry is as follows: "The city council shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair, and free from nuisances. All public bridges exceeding forty feet in length, over any stream crossing a state or county highway, shall be constructed and kept in repair by the county." Then follows a clause permitting the city council to appropriate money to aid in the construction of county bridges within the limits of the city, and in certain other cases. It is the contention of plaintiff that the provision quoted applies only to bridges within the limits of incorporated cities, and that county bridges without such limits may be less than forty feet in length. It is not claimed that the structure in question

2. —: —: limit of forty feet.

is within the limits of any city. It is true that section 527 is found in that part of the Code which relates specially to cities; but the Code should be treated as an entirety, and its various provisions construed together. *Hunt v. Farmers' Ins. Co.*, 67 Iowa, 742. There is no limitation on the natural effect of the language used. It applies to "all public bridges * * * over any stream crossing any state or county highway." *Roby v. Appanoose County*, 63 Iowa, 113. It seems designed to fix the liability of counties for all public bridges exceeding forty feet in length, on the highways named, but it does not seem to us to have any application to bridges not exceeding that length. As to such bridges, the law remains unchanged from what it was prior to the enactment of chapter 179, Acts Thirteenth General Assembly. *Roby v. Appanoose County*, *supra*, is not in conflict with this view. Section 303 of the Code requires the board of supervisors of each county "to provide for the erection of all bridges which may be necessary, and which the public convenience may require, within their respective counties, and to keep the same in repair." Section 990 of the Code is as follows: "When notified in writing that any bridge, or any portion of the public highway, is unsafe, the supervisor shall be liable for all damages resulting from the unsafe or impassable condition of the highway or bridge, after allowing a reasonable time for repairing the same; and if there is, in the district, any bridge erected or maintained by the county, then and in that event he shall, on such notice of the unsafe condition of such bridge, as soon as he reasonably can, obstruct passage on such bridge, and use strict diligence in notifying at least one member of the board of supervisors of his county in writing of the unsafe condition of such bridge; and, if he fails so to obstruct and notify, he shall be liable for all damages growing out of the unsafe condition of such bridge, occurring between the time he is so notified and such time as he neglects in obstructing such passage; * * * provided that nothing herein contained shall be construed to relieve the county

from liability for the defects of such bridge." This section requires the road supervisor to put in proper condition, after notification, all bridges which he is required to build and repair, and to obstruct the passage over other public bridges, and notify the proper officer of their condition. But what bridges is the road supervisor required to build? Manifestly, only such as can be built from the limited amount of funds at his disposal. Code, sec. 994. It is the settled law of this state that county bridges are such as require for their erection an extraordinary expenditure of money, "such bridges as cannot be constructed with the limited means under the control of the respective road-districts of the county, or such as have been constructed by the county." *Chandler v. Fremont County*, 42 Iowa, 58, and cases therein cited. The structure in question was not less than thirty-six feet in length, and rested on stone abutments. It was not only built by the county, but its cost was such that it could not have been constructed from the amount of funds within the control of the supervisor of the ordinary road-district. If, therefore, the county is not liable for the building and repairing of bridges of this class, no responsibility for them is vested in any public officer or corporation. We cannot think that such was the intent of the general assembly. It is contrary to the policy of the state, and against public interest. We think the better construction of the provision of law in question is that it fixes absolutely the liability of counties for public bridges, over streams crossing state and county highways, which exceed forty feet in length, and that liability for constructing and maintaining bridges forty feet or less in length is not affected by this provision, but depends upon the necessity and importance to the public of each bridge, its character and cost, and the financial ability of the road-district in which it is located to construct and maintain it.

III. It appears from the evidence that the bridge in question was not located within the territorial limits

3. —: —: whether on public highway: question for jury.

of defendant, but was built a short distance from the county line, and wholly within Benton county. The evidence tends to show that this was done to secure a better bridge-site, and one which would require a shorter bridge than would be necessary on the county line. The traveled road in which the bridge was built was on the county line, both north and south of the bridge, and left it only at the crossing of the stream. Evidence was offered tending to show attempts on the part of the proper officials of Tama and Benton counties to establish a highway along the county line at the crossing of the stream, and for some distance north and south of it; but it may be conceded, for the purposes of this case, that such establishment was not shown to have been officially made. The evidence tends to show that this road, including the crossing at the bridge, had been used by the public, and worked by the road supervisors, and improved by defendant, as a public highway for twenty years. During most of that time the land at the bridge, and on each side of it, had been fenced, leaving for a highway the road as traveled by the public, and improved by public officials. It is contended by defendant that it is not liable in this action, for the reason that the bridge was not on a public highway. But a highway may be established by the dedication of land for that purpose by the owner, and its acceptance by the public. *State v. Kansas City, St. J. & C. B. Ry. Co.*, 45 Iowa, 142; *Onstott v. Murray*, 22 Iowa, 469; *Wilson v. Sexon*, 27 Iowa, 16; *Manderschid v. City of Dubuque*, 29 Iowa, 78; *Quinton v. Burton*, 61 Iowa, 473. It was proper for the jury to determine, from the evidence adduced, whether or not the road in question was a public highway.

IV. The last point we need to consider is the claim of appellee that it had no authority to construct or repair the bridge because it was wholly within Benton county. Chapter 40, Acts Seventeenth General Assembly, authorizes the construction of county bridges on county-line

4. —: —: location outside of county: question for jury.

roads, wholly within one of the two counties interested, where a suitable site cannot be obtained on the county line. Defendant rebuilt the span over the main stream, and put piling under the other, after this law went into effect. Under the facts which the evidence tends to establish, we do not think defendant can escape liability because of the location of the structure within Benton county.

REVERSED.

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ROUNDY V. KENT.

1. **Contract:** REFORMATION: NEGLIGENCE OF PLAINTIFF. Where a party to a contract, through his own negligence, signs it without knowing or understanding its contents, when he has an opportunity to do so, a court of equity will not reform it so as to make it express his alleged understanding of what it was to contain.

2. ———: BETWEEN ATTORNEY AND CLIENT: REFORMATION: EVIDENCE. Plaintiff seeks a reformation of the contract in question on the ground that the other party to it was his attorney, in whom he placed special confidence, but who misled him as to its contents. But *held* that the evidence fairly showed that the contract expressed the intent of the parties when it was signed, and that, therefore, the allegation of special confidence was immaterial.

3. ———: FOR SALE OR COLLECTION OF NOTES: INTERPRETATION. The contract involved in this case (see opinion), *held* to be a contract for the sale of notes, and not merely for their collection.

4. ———: TO RECEIVE "PROPERTY" IN PAYMENT: INTERPRETATION. A contract for the sale of notes, in which the seller agrees to take in payment all "property" taken in their collection, binds him to accept real as well as personal property.

5. **Appeal:** PRACTICE: NO APPEAL TAKEN: OBJECTION TOO LATE. Where an appellee appears in this court, files an additional abstract, agrees to the record for submission, resists a motion for a continuance, and makes the first argument in the case, he cannot be heard to say that no appeal has been taken, when the appellant's abstract alleges to the contrary, and he denies it for the first time in his reply.

Appeal from Marshall Circuit Court—HON. D. D. MIRACLE, Judge.

FILED, MARCH 10, 1888.

Roundy v. Kent.

THIS is an action for the reformation of a written contract, and to recover five thousand dollars thereon, and for other relief. Defendants deny the alleged causes of action of plaintiff; and defendant Volney Kent asks for affirmative relief. The circuit court dismissed the petition as to defendant Snow, and rendered a decree in favor of plaintiff, and against defendant Kent. From this decree Kent appeals.

J. H. Bradley, for appellant.

Brown & Carney, for appellee.

ROBINSON, J.—The plaintiff brings suit upon an agreement signed by himself and defendant Snow, of which the following (omitting list of notes) is a copy:

"This article of agreement, made and entered into this 1st day of October, 1878, by and between Wm. H. Roundy, party of the first part, and B. L. Snow, party of the second part, witnesseth that, for value received, the said second party, or assigns, agrees to pay to the first said party the sum of seventy-three (73) cents on each and every dollar realized by the said second party, or assigns, from the following described promissory notes, this day sold by the said first party to the said B. L. Snow, after deducting all of the attorney fees in cases where suit is commenced to collect said notes, and after deducting all interest now due, or to become due, on said notes. * * * And it is further agreed that the said first party shall receive of the said second party, or assigns, all horses, wagons, buggies, cattle, hogs, or any other property or renewed notes, the same as cash, at the valuation which the said second party, or assigns, may take said horses, wagons, buggies, cattle, hogs, or other property, or at the face of the renewed notes aforesaid. The above-mentioned seventy-three cents on each dollar realized on said notes, after deducting all the attorney fees in case of suit, and all interest due, or to become due, on said notes, as herein before specified, is to be paid to the said Wm. H. Roundy by the said B.

L. Snow, or assigns, as fast as the said B. L. Snow, or assigns, shall receive the same. And it is expressly understood that if the above-described notes, or any one or more of them, are worthless, the said B. L. Snow, or assigns, shall charge the same to the said Roundy as cash for their amount at the date they are proved worthless; the said Roundy hereby representing that said notes are good at the date of his transferring them to the said second party. And the said second party hereby agrees to use due diligence in collecting said notes. In case said notes cannot otherwise be collected, the same shall be put into judgment.

"WM. H. ROUNDY.
"B. L. SNOW."

On this agreement was written an assignment from defendant Snow to defendant Kent, as follows:

"For value received, I hereby sell, assign, set over and deliver to Volney Kent all my right, title and interest in and to or any benefit whatever that may be derived from the within contract, and notes therein described, without recourse. B. L. SNOW.

"This 7th day of May, 1879."

When the agreement was signed, one or more notes of Snow were given to secure the performance on his part of this agreement. The assignment was made with the knowledge and consent of plaintiff, the note or notes of Snow surrendered, and a note of Kent taken in lieu thereof. The last-named note appears in the record, and provides, in terms, that it is given "simply to secure performance of a contract in writing." It is contended on the part of the plaintiff that the writing signed by himself and Snow does not correctly represent the real agreement; that he did not read it when signed, and did not know its contents; that at that time he was advanced in years, and eye-sight dim; that he was without his glasses, and unable to read writing readily; that he had great confidence in defendants, and was governed by their advice, and signed without scrutinizing the instrument as carefully as he would, had not the relation of attorney and client existed between them;

that the paper was read to him by Snow, but not as written; that it was read and explained to him to be in accordance with the verbal agreement of parties, which was that the notes were not to be sold, but were to be transferred for collection only; that plaintiff was to have seventy-three per cent. of the face of the notes, and interest; that the interest was to be divided between plaintiff and Snow, share and share alike; that only personal property, including money, could be received in payment; that the clause in regard to the charging to plaintiff all worthless notes in cash was fraudulently inserted by defendants in lieu of the agreement made, which was that such notes should be returned to plaintiff, and credited at seventy-three per cent. of amount due thereon on the collateral security, or stricken out. The petition further states that the assignment of the contract to Kent was not in good faith; that both defendants are jointly interested therein; that they have collected $3,015, of which they have accounted for but one hundred and fifty dollars. A due-bill for $151.07, dated August 13, 1879, bearing interest at ten per cent., and signed by Kent, is also set out. Plaintiff asks that the contract be construed and reformed, and that judgment be rendered for the amount due. The answers admit the making of the contract and assignment, but deny all fraud and alleged secret agreements. Defendant Kent alleges that the due-bill is without consideration, and was the result of an error in computation; that plaintiff is owing to him, on account of the agreement, about fourteen hundred dollars, with interest thereon from August 1, 1879; and asks judgment for that amount, and that his collateral note and due-bill be annulled and surrendered.

I. The evidence seems to show that the notes in controversy amounted to about fifty-seven hundred dollars, besides interest, when the agreement was made. They were given for so-called "patent-rights" by persons who were living in different states, and at places widely separated. Most of the notes were made payable to

1. CONTRACT: reformation: negligence of plaintiff.

plaintiff, or to a firm of which he was a member. He thought, at the time, that seventy-five per cent. of them could be collected, and that it was desirable for the person collecting to visit the makers. When the contract was made, Snow was a partner of a lawyer, but had not himself been admitted to the bar, and was not so admitted for two or more years thereafter. At least some of the notes in question had been in the possession of the firm of which he was a partner, for collection, since the fall of 1878. The contract, although dated as of that time, was not drawn until the spring of 1879. It was drawn by Kent for both the parties to it. There is controversy as to this, but the plaintiff's claims are contradictory, and the clear weight of the evidence is against him. We think it appears that the writing was read by plaintiff before it was signed, and that he understood its contents at that time. It was under consideration for some days before it was completed. If plaintiff did not know its contents, it was his own fault, and the result of his own negligence, and he is not shown to be entitled to any relief from its provisions. *Wallace v. Chicago, St. P., M. & O. Ry. Co.*, 67 Iowa, 551; *McKinney v. Herrick*, 66 Iowa, 416; *McCormack v. Molburg*, 43 Iowa, 561. The fact that plaintiff was in error as to the value of the notes at the time the agreement was made, and that to enforce its provisions now may be a hardship for him, does not alter the rule. He was in better position to know the value of the paper than were the defendants, and, if his estimate had proven to be good, the contract might have been as advantageous to him as to either defendant.

II. It is insisted that the relation of attorney and client existed between plaintiff and defendants at the time the contract was signed, and that the law will not uphold it for that reason. Plaintiff is not seeking to avoid the contract, but to reform and enforce it. It can only be reformed to express the real agreement of the parties in case it fails to do so now. The evidence fairly shows that the agreement, as it now appears, expresses the intent of the parties to it when it was signed; hence

2. ——: between attorney and client: reformation: evidence.

plaintiff cannot now justly complain. We do not wish to be understood as saying that the relationship charged really existed; it is not necessary for us to decide that question.

3. ——: for sale or collection of notes: interpretation.

III. Counsel for appellee contend that the contract itself shows that it was not designed to transfer the title to the notes, but to secure their collection for the benefit of plaintiff. This does not seem to us to be the effect of the language used. An absolute sale is specified, and the ascertaining and payment of the price is provided for. Diligence in collecting and accounting for the proceeds is required. The references to attorney's fees and interest, and kinds of property to be taken, and the amounts to be allowed therefor, seem designed to prevent ambiguity; hence we conclude that the position of counsel is not well taken.

4. ——: to receive "property" in payment: interpretation.

IV. It is claimed that the contract contemplates the receiving of personal property only, and objection is made to allowing defendant Kent for a tract of land for which he obtained a deed in partial settlement of one of the claims. The contract does not limit defendant to the taking of personal property in settlement. The evidence tends to show that the taking of the deed in question was approved by plaintiff. But his approval would not be necessary, for the reason that Kent had the right to take it, if he acted in good faith in so doing; and that he did so act does not seem to be questioned.

5. APPEAL: practice: no appeal taken: objection too late.

V. It is contended by appellee that the record does not show that an appeal has been taken in this case. This objection is first made in the reply of appellee. He appeared in this court, filed an additional abstract and agreed to the record for submission. He also appeared to resist a motion for a continuance, and made an argument before the argument was made for defendant. His additional abstract does not deny the allegations of the abstract that an appeal had been perfected.

We do not think he should be permitted to deny that this case is now properly in this court.

VI. The defendant Kent asks judgment in his counter-claim for overpayment, and an account of notes shown to be worthless, and for a note delivered to plaintiff for collection. Taking all the provisions of the contract together, we conclude that Kent is entitled to retain from each note collected, in whole or in part, attorney's fees, and interest actually collected thereon, but is not entitled to make up any deficiency in a note paid in part by retaining from collections made on another. No authority is given to sell renewal notes. The provision in regard to charging plaintiff with certain notes refers to notes proven to be wholly worthless, and not to those from which something was realized. In some cases notes were settled for less than the interest due. Excluding them, we find that Kent collected $1,045, of which $253.15 was interest. After deducting interest, and twenty-seven per cent. of the remainder, $578.27 was the amount to be accounted for to plaintiff. He has received $158.75 in stock, and the deed and note tendered by Kent, and brought into court, amount to $471.28; making an overpayment of $51.76. Twenty-seven per cent. of the notes shown to be worthless, and the interest due on the total amount of such notes, make $1,216.67. The amount Kent was entitled to for the note delivered to plaintiff for collection is $36.38; making a total of $1,304.81, besides interest, which Kent is entitled to recover from plaintiff. Interest on the amount due from August, 1879, is asked. It is also found that the deed and note tendered in suit belong to plaintiff, and that the due-bill and collateral note of Kent should be cancelled and surrendered. Judgment will be entered for defendant Kent for the amount found due him, with interest thereon at six per cent. per annum from the first day of September, 1879, and for the cancellation of his due-bill for $151.07, and collateral note for $3,533.32.

REVERSED.

LEWIS V. LEWIS.

1. **Appeal:** EXAMINATION OF WITNESSES: DEFECTIVE ABSTRACT. Whether the conduct of the trial court in examining witnesses was erroneous or prejudicial, is a question which cannot be considered on appeal when the abstract does not give all the evidence and proceedings on the trial.

2. ——: INSTRUCTION: NO EXCEPTION TAKEN. Where no exception was taken to an instruction, nor to a motion for a new trial based on error in giving it, this court cannot review it.

3. ——: EVIDENCE: NO PROPER OBJECTIONS BELOW. Merely to object to evidence without giving any grounds for the objection lays no foundation for a review of the evidence in this court.

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, MARCH 12, 1888.

ACTION to recover damages alleged to have resulted from wrongful acts of the defendant. Verdict and judgment for the plaintiff, and the defendant appeals.

McHenry, McHenry & McHenry, for appellant.

Parrott & Sellers, for appellee.

ROBINSON, J.—I. Appellant complains of the action of the district court in examining witnesses during the trial of the cause. Whether that action was erroneous and prejudicial or not is a question not properly presented to us for determination. The abstract does not purport to give all the evidence offered, and all the proceedings had on the trial, and appellee insists that it does not. No objection to the alleged irregularity was made during the trial, and it is not made a ground of the motion for a new trial. The objection seems to be

1. APPEAL: examination of witnesses: defective abstract.

made for the first time in this court, and cannot now be considered.

II. Appellant objects to a portion of the charge of the court to the jury. Appellee insists that no exception was taken to the matter of which complaint is now made. We find this to be the case. No exception was taken when the charge was given, nor was any afterwards filed. The motion for a new trial alleges that the court erred in giving it, but points out no ground of objection. No exception was taken to the action of the court in overruling the motion for a new trial. Appellant cannot therefore now be heard to complain of the alleged error.

2. ——: instruction: no exception taken.

III. Appellant complains of certain rulings of the court in regard to the admission of evidence. In several cases of which complaint is made objections were interposed by defendant, but no grounds therefor were stated. In one case the question objected to was not answered, and in but a single instance did the objection of defendant raise any question for the determination of the court. We think the rulings on that objection, and on all others in question, were correct.

3. ——: evidence: no proper objections below.

IV. It is claimed that the verdict was not supported by the evidence. The evidence was conflicting, and we are not prepared to say that it does not sustain the verdict.

AFFIRMED.

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NELSON V. HAYS.

Pleading: AMENDMENT: STRICKEN FROM FILES: ACTION ON GUARDIAN'S BOND. A minor, just prior to his majority, assigned a portion of his estate to plaintiff, and after his majority assigned the whole of it to P. Afterwards, P. recovered a judgment for the whole in an action on the guardian's bond. While this action was pending, plaintiff commenced an action on the guardian's bond to recover the amount assigned to him, and, by amendment, he made P. a party. Plaintiff's real ground of action against P. was that the latter, as a part of the consideration of the assignment to him, had agreed to pay plaintiff; but plaintiff pleaded this fact for the first time at the close of the evidence. *Held* that the court did not abuse its discretion in striking this amendment from the files, because it was the first plea of any real cause of action; the original action on the guardian's bond being without ground, since the guardian had already been adjudged to pay the money to P.

Appeal from Monroe District Court.—HON. DELL STUART, Judge.

FILED, MARCH 12, 1888.

THIS is an action against the principal and sureties in a guardian's bond. There was a trial by the court, and a judgment against the plaintiff, and he appeals.

Phillips & Greer, for appellant.

Ed. Morrison, Daniel Anderson and *H. L. Dashiell*, for appellees.

ROTHROCK, J.—It appears from the record that the defendant Samuel D. Hays was guardian of Arthur Morrison, a minor, who attained his majority in November, 1885. On the fifteenth day of August, 1885, Morrison assigned to the plaintiff the estate and money in the hands of his guardian to the amount of two hundred and forty-three dollars. On the fourteenth day of December, 1885, said Morrison assigned all of his money

and estate in the hands of his guardian to the defendant Peterson. Morrison and Peterson commenced a proceeding jointly to compel Hays, the guardian, to make final settlement of his guardianship, and at the February term, 1886, of the court there was found to be due from the guardian the sum of seven hundred and eighty-two dollars, and that the same was the property of Peterson, and an order was made that the guardian pay said sum March 1, 1886. Hays, the guardian, failed to make the payment, and, on the third day of March, Peterson brought an action on the guardian's bond for the amount found to be due. This action proceeded to judgment at the October term, 1886, and afterwards Peterson collected the whole amount of the judgment by the sale of property on execution. The plaintiff commenced the action at bar on the twenty-fourth day of May, 1886. It was then an action on the guardian's bond, to recover the amount which he claimed had been assigned to him by Morrison. He sought a recovery against the principal and sureties on the bond. It will be observed that the action was commenced after the guardian had been ordered to pay the money to Peterson, and after Peterson had commenced his action to recover the amount awarded to him. The plaintiff intervened in the action brought by Peterson on the bond; but his petition of intervention was dismissed for want of prosecution. On the twenty-fifth day of August, 1886, the plaintiff filed an amendment to his petition, in which he made Peterson a party defendant in this action; and he averred therein, in substance, that Peterson claimed some interest in said money, adverse to the plaintiff, under an assignment, but that said interest or assignment was taken subsequent to the assignment of the plaintiff, and subject to his right and claim, and with a full knowledge of plaintiff's claim. Judgment was demanded against Peterson for the amount of plaintiff's claim. Afterwards the plaintiff procured a writ of attachment to issue against the property of Peterson. Thereupon there were answers and counter-claims filed by the defendants, and motions to strike, and demurrers, and

replies, and other papers too numerous to mention. The fact is that what ought to have been a very simple and plain controversy was so mystified by pleadings that the court and counsel must have had great difficulty in determining just what was in issue. Finally the case was reached for trial, and at the close of the evidence the plaintiff filed an amendment to his petition, in which he claimed that Peterson took the assignment of the claim, and, as part of the consideration therefor, agreed with Morrison that he would pay the indebtedness of Morrison to the plaintiff. The defendant Peterson moved to strike the amendment from the files, because it substantially changed the cause of action stated in the original petition. This motion was sustained, and the court dismissed the petition, and rendered a judgment against plaintiff for thirty-one dollars for wrongfully suing out said attachment.

If the plaintiff had filed this last amendment as his original petition, instead of waiting until the close of the trial to do so, he would have presented a plain and intelligent claim, upon which an issue could have been made, and his rights determined. We entertain no doubt that the court exercised a proper discretion in striking the amendment from the files. It was the first distinct demand made by the plaintiff to recover of Peterson on any proper cause of action; and it was just what should have been done when the action was commenced. There was no ground for commencing an action upon the guardian's bond, in the face of the adjudication that the money should be paid to Peterson. If plaintiff has any valid claim to assert, it is against Peterson, founded upon his knowledge of the assignment and his agreement with Morrison to pay the plaintiff's claim; and he ought not to complain because he was not permitted to set up this cause of action after he had tried his case; and the judgment for wrongfully suing out the attachment ought not to be disturbed, because there was no ground for an attachment when it was issued.

AFFIRMED.

ARTS *et al.* v. GUTHRIE *et al.*

1. **Churches**: UNINCORPORATED: ACTION BY TRUSTEES. Upon a division of a religious society under an agreement for an apportionment of its property between the new societies organized by the several factions, the trustees of one of the new societies, appointed for the purpose of collecting its dues from the other new society under the contract of division, are the proper parties to bring an action for that purpose, though the society for which they act is not incorporated; and the fact that the name of the society is joined with theirs as plaintiff does not affect their right to recover. (See Code, sec. 2544, and cases cited in opinion).

2. ——: ACTION AGAINST REFEREE: PERSONAL LIABILITY. Where the maker of a bond for the payment of a debt due from a church is described therein as a referee, but it requires him to make the payment therein provided for, not in a representative capacity, but as an individual, he cannot escape personal liability thereon; and such is the bond set out in the opinion in this case.

3. ——: USE OF CHURCH: CONSIDERATION FOR BOND. While the title to all the property of a congregation was in the bishop of the church, for the use, however, of the congregation, the sale of the exclusive right to such use by one portion of the congregation to the other, upon a division of the congregation into two societies, and the actual exclusive use thereof by the purchasing faction, was a valid consideration for a bond given to the other faction for such exclusive use. [REED, J., *dissenting*].

Appeal from Carroll District Court.—HON. J. P. CONNER, Judge.

FILED, MARCH 12, 1888.

THIS is an action on a written obligation executed by defendants to secure the payment of money. The case was tried by a jury, and a verdict returned in favor of plaintiffs. Judgment was rendered on the verdict, and defendants appeal.

Geo. W. Paine and *Cole, McVey & Clark*, for appellants.

E. M. Betzer and *George R. Cloud*, for appellees.

ROBINSON, J.—In June, 1885, there existed at Carroll an unincorporated association, composed chiefly of persons of German and Irish descent, known as the "St. Joseph's Catholic Congregation." At that time there was trouble between the German members of the congregation on the one side, and the English-speaking, or Irish, members on the other. It was finally determined by the advice and direction of the bishop of the diocese in which Carroll was situated that the congregation should be divided, and the property it had used sold to the highest bidder; it being the understanding that one of the two parts into which the congregation was to be divided would be such bidder. It was further arranged that the debts of the original congregation should be paid, and the surplus of the price realized from the sale of the property divided between the new congregations in proportion to the membership of each, and the amounts it had contributed towards the property. Defendant Guthrie was appointed by the bishop to represent the Irish element of the congregation, and one W. J. Bohnenkamp to represent the German, in carrying out the agreed plan of separation. The persons so appointed agreed upon the details of a settlement of the financial interests involved, and appointed a person to sell the property. The sale was effected to defendant Guthrie, for the English-speaking portion of the congregation, for the sum of $11,200. By the terms of the settlement, as arranged by the representatives of the two elements aforesaid, fifty-seven per cent. of the purchase price remaining after the payments of debts should be paid for the use of the German members of the original congregation. As a part of the settlement, the defendants executed the instrument in suit, of which the following is a copy:

"Know all men by these presents that I, P. M. Guthrie, as referee of the English-speaking portion of the congregation of St. Joseph's Catholic Church, at Carroll, county of Carroll, Iowa, and Charles Hamilton and James M. Bozee as sureties, are held and firmly

bound unto W. J. Bohnenkamp, as referee of the German-speaking portion of said congregation, in the penal sum of eight thousand dollars. The conditions of this bond are such that whereas, the said P. M. Guthrie, as referee aforesaid, has this day purchased of W. J. Bohnenkamp, as said referee aforesaid, all the interest of the German-speaking portion of said congregation in and to the west half of block forty, in Carroll, Iowa, for the sum of $11,200, now, if the said P. M. Guthrie will pay, or cause to be paid, unto said Bohnenkamp, as referee aforesaid, fifty-seven per cent. of the above amount, after first deducting therefrom the amount of the debt upon said property up to this date,—payment to be as follows: Said P. M. Guthrie will within sixty days from this date, at his option, either deliver to said Bohnenkamp, as aforesaid, good bankable notes, drawing interest at ten per cent., one-half to be payable within six months, and one-half payable in one year, from this date, said notes to represent the purchase price; or the money is to be paid within sixty days, also with interest at ten per cent. from this date,—then and in that case this bond to be void; otherwise to be in full force and effect.

"Dated at Carroll, this third day of July, 1885.

"P. M. GUTHRIE.
"CHARLES F. HAMILTON.
"JAMES M. BOZEE."

Three thousand dollars have been paid according to the terms of this obligation. The congregation was divided pursuant to the plan of division adopted; the English-speaking members retaining the original name, and the church property. The German members adopted the name, "St. Peter and St. Paul Catholic Congregation," built a church edifice, and were furnished a priest, and separate services have been maintained. The division and settlement ordered by the bishop, and managed by the representatives he appointed, seem to have been carried into effect with the approval of all parties in interest. In November, 1885, the plaintiffs William Arts, Joseph Wiedemeyer and Henry Mans-

were elected trustees by the new congregation for the purpose of collecting debts due the congregation, and paying the debts it was owing. By an amendment to the petition, made, apparently, without objection on the part of defendants, the title of the action was amended by inserting "The St. Peter and St. Paul Congregation" with the names of the plaintiffs.

I. The first objection to the judgment urged by defendants is in the following language: "The plaintiffs have not, nor have either the St. Peter and St. Paul Catholic Congregation, nor the said Arts and others, as trustees, any right to bring this suit." The facts showing the capacity in which each of the plaintiffs sued, and his right to join as party plaintiff, were fully set out in the petition. The objection made by appellants is based upon the action of the district court in overruling a motion made by defendants, after the plaintiffs had introduced their evidence and rested, to dismiss the action, on the ground "that plaintiffs are not shown competent to sue." If it be conceded that the method adopted by the defendants was the proper one, and taken at the right time, it is yet evident that the action of the court was right, so far as it related to the ground of the motion set out, if any of the parties plaintiff were competent to maintain the action. The St. Peter and St. Paul Catholic Congregation was an unincorporated association, and, so far as the facts are shown, was not competent to join as party plaintiff; but that fact did not entitle the defendants to have the action dismissed. *Dist. Twp. of White Oak v. Dist. Twp. of Oskaloosa*, 44 Iowa, 517. It is shown that the three plaintiffs who sue as trustees were appointed by the German portion of the original congregation, after the separation, to collect claims due to the new congregation. That is what they are seeking to do in this case, and we think they are competent and entitled to do so. Code, sec. 2544; *Laughlin v. Greene*, 14 Iowa, 94.

1, CHURCHES: unincorporated: action by trustees.

II. The next objection of defendants is stated as follows: "Since the bond in this case was given by 'P.

2. ——: action against referee: personal liability.

M. Guthrie as referee,' to 'W. J. Bohnenkamp as referee,' there can be no recovery against P. M. Guthrie as an individual." It is true that Guthrie is described in the first part of the instrument as referee, but it is also true that he is bound by it personally, in his individual capacity. It requires him to make certain payments, not in a representative capacity, but as an individual. It is signed by him as an individual, and it is not shown that any one but himself and his co-defendants are under any obligation to make the payments for which it provides. In view of the language of the obligation and the facts in the case, we think the objection under consideration is not well taken.

III. The third objection is stated as follows: "The contract was without consideration, and this appears without conflict in the evidence, and the court should have so instructed the jury."

3. ——: use of church: consideration for bond.

It is shown that by the usage of the Catholic Church, and by deed, the title to all the property used by the St. Joseph Congregation prior to the division was vested in the bishop of Dubuque. It is urged that, in consequence of this fact, no title passed by virtue of the alleged sale; therefore, that there was no consideration for the obligation in suit. While it is true that the legal title to this property was in the bishop, yet it appears that it was so held for the use and benefit of the St. Joseph Congregation as originally constituted, and that all members of that congregation who obeyed the rules of the church were entitled to participate in such use and benefit. It also appears that the new congregation relinquished all claim to this property after their new edifice was ready for use, and that the English-speaking portion of the old congregation have had the exclusive use and benefit of the property since the new church was built. It also appears that the division of the congregation has been completed as planned. Certainly, the settling of the troubles which led to the division, the withdrawal of the new congregation, and the right of those who remained to the exclusive use

and benefit of the property, formed a sufficient consideration to support the undertaking of defendants.

AFFIRMED.

REED, J., dissenting on third point in the foregoing opinion.

ROWLAND *et al.* v. BROWN.

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1. **Tax Sale and Deed:** NOTICE TO REDEEM: PERSON IN POSSESSION: WHO IS. A woman who has an interest in land sold for taxes, and who resides on it at the time the notice to redeem is given, not as having any control of the land, but simply as housekeeper for her brother, who has full control, is not a person in possession in such sense that she is entitled to have such notice served on her. [BECK, J., *dissenting*].

2. ——: ——: DESCRIPTION OF LAND: NUMBER OF ACRES. A notice to redeem from tax sale, which was otherwise unobjectionable, described the land as the "N. W. ¼ of the N. E. ¼ of section thirty (30), township seventy-two (72), range twenty-four (24), 30 acres," when in fact the subdivision described contained forty acres. *Held* that the description was sufficient, because the number of acres, being inconsistent with the area as shown by the other certain description, must be rejected as surplusage, under the rule of *Ufford v. Wilkins*, 33 Iowa, 112. (See opinion for cases distinguished).

3. ——: ——: PROOF OF SERVICE: ATTACHED AFFIDAVIT: COUNTY OF SERVICE AND OF CERTIFYING NOTARY. Where a return of service of a notice to redeem is made on the same paper, it may be verified by a proper affidavit attached and referring thereto; it need not be on the same paper. (*Stull v. Moore*, 70 Iowa, 150; *Johnson v. Brown*, 71 Iowa, 609). Nor need the return show the county of service; for that is immaterial where the service is personal. Nor is such service deficient because it does not show for what county the notary who administered the oath was qualified to act; for of that the courts will take judicial notice. (See *Stoddard v. Sloan*, 65 Iowa, 685).

Appeal from Clarke District Court.

FILED, MARCH 12, 1888.

ACTION in equity to set aside a tax deed, and to redeem the land therein described from tax sale. On

the hearing in the district court, the petition of the plaintiffs was dismissed, and the costs of the action taxed to them. Plaintiffs appeal.

M. L. Temple and *John Chaney*, for appellants.

T. M. Stuart, for appellee.

ROBINSON, J.—I. The question involved in this case is stated by appellants to be "the sufficiency of the notice of expiration of the time for redemption." The land in controversy was sold for delinquent taxes on the second day of October, 1882. The certificate of purchase was assigned to defendant, who obtained a treasurer's deed for the land on the twelfth day of May, 1886. January 21, 1886, the notice in controversy was served on J. C. Rowland, in whose name the land was taxed, and on Henry Rowland. It is urged by appellants that the service of the notice was not sufficient, for the reason that it was not made on Nellie Rowland, who is a plaintiff in this action, and who had an interest in the land at the time in question. The evidence in regard to her ownership and the possession of the land is as follows: J. C. Rowland testified that "on the twenty-first day of January, 1886, and prior, my brother, J. H. Rowland, and sister, Nellie Rowland, were living on this forty, occupying the house, and in possession of the property. My brother's name is Henry,—is known as J. H.,—and he has been in possession of this land all the time. J. H. Rowland is a single man, and his sister, Nellie, aged about nineteen years, kept house for him, and lived with him on the property, and she was one of the heirs to the property. I had bought J. H. Rowland's share in the land, and was permitting him to live on it, and his sister with him, keeping house for him. In 1886 it was part pasture and part meadow-land, and in 1885 was pastured by J. H. Rowland. He and his sister lived there." J. H. Rowland testified as follows: "In January, 1886, I lived on the land in controversy, and was a farmer. I had this piece of land in

1. TAX sale and deed: notice to redeem: person in possession: who is.

pasture, and pastured on it my horses, cattle and hogs. My sister was keeping house for me. The land belonged to my brother, J. C. Rowland, mostly, and I rented of him." The statute requires the notice to be served "upon the person in possession of such land or town-lot, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated." The notice is not required to be served on the owner unless he is in possession of the land, or unless it is taxed in his name; therefore the fact that Nellie Rowland had an interest in the property did not require that notice be served on her. The material inquiry is, was she in possession of the property, either alone or in connection with another, within the provision of the statute we have quoted? The possession contemplated by this provision is actual and not constructive. It involves the occupying and controlling of the land, and not a mere residence upon it. It will be noticed that no claim is made that Nellie had any control over the premises, nor any interest therein, as resulting from her residence thereon. She appears to have been a member of the family of her brother, for the purpose of serving him as a housekeeper. He rented the land from his brother, and not from Nellie, and occupied it for his own use and benefit. His stock was pastured on the land, and he seems to have been the only one who had a right to occupy, use and control it when the notice was served. If the construction of the statute contended for by appellants be the true one, then it would be necessary to serve the notice, not only upon the person in actual possession of the land, but upon each adult member of his family. We cannot think that this was the intent of the general assembly, and conclude that, under the facts of this case, notice was not required to be served on Nellie Rowland.

II. The next objection urged against the notice is that it did not sufficiently describe the land. The description therein contained is as follows: "N. W. ¼ of the N. E. ¼ of section thirty (30), township seventy-two (72), range

2. —: —: description of land: number of acres.

twenty-four (24), 30 acres." The evidence shows that the northeast quarter of the northwest quarter of section 30, in question, contains forty acres. It is claimed by appellants that the notice informed the persons on whom it was served that it was the intent of the owner of the certificate to take a deed for thirty of the forty acres contained in the tract described, and that since the thirty acres were not particularly described, the notice is insufficient for any purpose. *Blair Town Lot & Land Co. v. Scott*, 44 Iowa, 144; *Poindexter v. Doolittle*, 54 Iowa, 52; *Vaughan v. Stone*, 55 Iowa, 214; and *Roberts v. Deeds*, 57 Iowa, 320, are cited in support of this claim. We do not think these cases sustain the claim of appellants. It is not pretended that the sale was of "30 acres" in the tract described; and the notice certainly does not state that a deed for but thirty acres will be made if the property is not redeemed. The description given is complete without the addition "30 acres;" hence this may be rejected as mere surplusage. It is a rule of construction adopted by this court that when the quantity of land mentioned in a deed as a part of the description is inconsistent with the area as shown by other certain description, the statement of quantity will be rejected. *Ufford v. Wilkins*, 33 Iowa, 112. We think the same rule should be applied to the notice in controversy. The notice directed the attention of the persons on whom it was served to the date of the tax sale, the name of the purchaser, and the tract of land sold, as well as to the time within which redemption was required to be made. They could not have been misled by the erroneous part of the description in question.

III. It is insisted that the proof of service of the notice was insufficient to authorize the treasurer to issue the deed. An unverified return was made on the notice. An affidavit of the agent of the holder of the certificate of purchase was attached, stating that service had been made as shown by the return. This was a sufficient compliance with the statute.

3. ——: ——: proof of service: attached affidavit: county of service and of certifying notary.

Johnson v. Brown, 71 Iowa, 609; *Stull v. Moore*, 70 Iowa, 150. It is further objected that the county in which service was made is not shown in the return. The statute requires the notice to be served on the person in possession of the land, and on the person in whose name it is taxed, if he resides in the county where the land is situated. The place of service is not material where there is actual service; and the return need show only the service, and the particular mode thereof. In this respect the requirements are not the same as in the case of an original notice. Code, secs. 894, 2604. It is also said that the proof of service is deficient, in that it is not shown for what county the notary who administered the oath to the agent was qualified to act. We held in *Stoddard v. Sloan*, 65 Iowa, 685, that we would take judicial notice of the official character of a notary public, and of the county for which he was appointed. This case falls within the scope of that decision.

AFFIRMED.

BECK, J., (*dissenting*). In my opinion, the record shows that Nellie Rowland was in possession of the land jointly with her brother J. C. Rowland, and her rights are not cut off, for the reason that she was not served with notice of the expiration of the time for redemption.

HOSIC V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

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1. **Railroads:** INJURY TO BRAKEMAN: DEFECTIVE APPLIANCES; CUSTOM NO EXCUSE. Plaintiff was one of defendant's brakemen, and he sues for injuries received on account of defendant's negligence in loading a flat-car with machinery, and placing it in the train so that his duties required him to pass over it, without providing it with a foot-board so as to make such passage safe. *Held* that there was evidence from which the jury were justified in finding that defendant was negligent in not providing a foot-board, and that the fact that such negligence was customary would not relieve defendant from liability for its consequences.

75 683
88 414
75 683
93 242
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98 551
75 683
128 487

2. ——: ——: ——: ASSUMPTION OF RISK. In such case, though plaintiff knew that defendant was accustomed to have cars so loaded without providing foot-boards, it was not shown to be usual to place such cars where brakemen were required to pass over them. Therefore it could not be said that he assumed the risk by accepting the service.

3. ——: ——: GOING ON DANGEROUS CAR: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. In such case, even if plaintiff knew, before going upon the car loaded with machinery and not provided with a foot-board, that an attempt to pass over it would be dangerous, he could not, as matter of law, be said to be guilty of contributory negligence in going upon it, for that was a question for the jury, and depended upon the nature of his duties, the urgency of the case, and the orders of his superiors, as shown by the evidence. (See opinion for cases distinguished).

Appeal from Mahaska District Court.—HON. J. K. JOHNSON, Judge.

FILED, MAY 10, 1888.

THIS is an action brought to recover for personal injuries alleged to have been caused by the fault of defendant. The case was tried to a jury, and a verdict returned for plaintiff. Judgment was rendered on the verdict, and defendant appeals.

Thos. S. Wright and *Lafferty & Johnson*, for appellant.

John F. Lacey, for appellee.

ROBINSON, J.—On the twenty-third day of November, 1883, plaintiff was in the employ of defendant as head brakeman on a freight train. He was about eighteen years of age, had been in the service of defendant for two months preceding the date named, and had acted as brakeman at different times for a year. At 12:45 o'clock in the morning of the day named, the train on which plaintiff was employed left Rock Island on its run through Sigourney to Oskaloosa. The train contained a platform-car, loaded with plows and other farming implements, which, at the time in question, was the second car from the engine. This car was not provided with a foot-board, and could be passed over

only by stepping on the implements with which it was loaded. As the train approached Sigourney, the plaintiff attempted to pass over this car to set a brake, and in so doing fell to the ground in such a manner that several car-wheels passed over his right arm, crushing it, and causing it to be amputated above the elbow. Plaintiff contends that his fall was due to the negligence of defendant in not providing the car in question with a suitable passage-way over its load.

I. It is claimed by appellant that the car from which plaintiff fell was loaded in the manner usual on its road, and that it was not customary at that time, and never had been, to place foot-boards over cars so loaded; that plaintiff knew these facts before he was employed by defendant; and that, by accepting service with that knowledge, he assumed all risks and hazards growing out of the manner of loading such cars without foot-boards. We understand that foot-boards, otherwise known as "running-boards," are placed lengthwise of the car, and above their loads, in such manner as to afford a convenient way for the use of brakemen in passing from one part of the train to another. Under the charge of the court, the jury must have found that defendant was negligent in not providing a foot-board for the car in question. This being true, the fact that such negligence was usual or customary would not relieve defendant from liability for its consequences. *Hamilton v. Des Moines Valley Ry. Co.*, 36 Iowa, 38. But we do not think the jury would have been justified in finding from the evidence that plaintiff assumed the risk alleged by defendant. It is true that it was common for defendant to haul cars of agricultural implements which were not provided with foot-boards, but it was not shown to be usual to place such cars where the brakemen were required to pass over them in the discharge of their duties. On the contrary, the jury might well have found from the evidence that it was usual to place them near the middle of the train. As to whether it was the

1. RAILROADS: injury to brakeman: defective appliances: custom no excuse.

2. ——: ——: ——: assumption of risk.

rule of the defendant to provide cars like that in controversy with foot-boards, the evidence was conflicting, but the jury were justified in finding that it was negligence not to provide them.

II. Appellant insists that if appellee knew, before going onto the car from which he fell, that an attempt to pass over it would be dangerous, then he was negligent in making the attempt, and should not be permitted to recover in this action, for the reason that his own wrong contributed to the injury of which he complains. It is even suggested that plaintiff should have refused to go out with his train because it contained the car in question. Whether plaintiff was negligent in attempting to pass over the car does not depend entirely upon his knowledge of the danger involved, but rather upon all the circumstances of the case. It was not the duty of the plaintiff to refuse to go out with his train. When this left Rock Island, it was dark, and it is not shown that he knew there was no passage-way over the car in question until the moment of his going onto it at the time of the accident. We think the evidence shows that at that time he must have known the condition of the car, and is chargeable with knowledge that an attempt to pass over it would be dangerous. Will that fact defeat his recovery? Appellant insists that it will, and cites numerous decisions of this court in support of its position. But none of those decisions involve the principle of this case. In *Kroy v. Chicago, R. I. & P. Ry. Co.*, 32 Iowa, 358, the brakeman had attempted to uncouple a train while in motion. The attempt was not only dangerous, but was made without orders. It was not in the line of his duty, and was not sanctioned by any one having authority to direct the act to be done, and it was properly held that there could be no recovery for his death, which resulted from the unauthorized attempt.

8. ——: ——: going on dangerous car: contributory negligence: question for jury.

In *Muldowney v. Ill. Cent. Ry. Co.*, 39 Iowa, 616, the plaintiff's intestate voluntarily undertook to make a

coupling while the cars were in motion. He was warned by some of the trainmen not to make the attempt, as it was dangerous. He could see that the warning was well founded, but persisted in the attempt, and was injured. It was not his duty to make the coupling at the time and in the manner attempted. Other cases cited by appellant involve the principle that, where an employe sustains an injury in consequence of defective railway appliances or appurtenances of which he had due notice, and where the injury results from an act of the injured person which he might have avoided, or which he was under no obligation to perform in the manner which led to the injury, then he cannot recover. But these cases have no application to this case. When the train approached Sigourney, plaintiff was riding on the engine. At the proper time for setting the brakes, he went onto the car next to the engine, and attempted to set a brake, but found it would not work. In order to reach a brake that could be used, it was necessary for him to pass over the car in question. Appellant insists that it was not necessary for him to set a brake; that the conductor had told him, a short time before, that he need not go on top of the train; that the train contained but few cars, and could be controlled with the brakes at the rear end; and that it was in fact so controlled. It is not claimed that plaintiff was ordered not to take his usual and proper station, and it is shown that this was at the forward end of the train. His duties included the setting of brakes at that end when required. He was at his proper station when the train approached Sigourney, and claims that it was then running at a higher rate of speed than was usual in approaching stations, and that the engineer gave the signal for brakes. This is disputed by appellant, but there was evidence tending to support the claim, and it was for the jury to determine the truth of the matter. It appears that it was not usual for the engineer to whistle for brakes when approaching a station, and that, when he did, it indicated that something was wrong with the track; that the train was going in too fast; that the brakemen were not doing

their duty, or something else which called for prompt action. The jury were told by the court that, in passing upon the question as to whether plaintiff was guilty of negligence contributing to his injury, they should consider among other things whether or not a signal for brakes was given, "and whether there was any necessity for setting the brakes on the forward end of the train." If the signal for brakes was given, or if plaintiff had good reason to believe the brakes should be set on his end of the train, what should he have done when he discovered that the brake on the first car would not work? Appellant seems to claim that he should have done nothing, for the reason that he could only set a brake by passing over the car in question, and that he could only do that by taking a dangerous risk. This does not appear to us to be a correct view of the case. The efficiency of the railway service, and the due protection of life and property, require prompt obedience to orders, and prompt discharge of duties, on the part of employes. And this is especially true in regard to the management of trains while in motion. It would not do to make the subordinate judge of the propriety of obeying an order, or to decide as to the necessity of discharging a duty. In this case it was the duty of plaintiff to obey the signal if one was given. If none was given, yet if, under the rules of the road, brakes should have been set on his end of the train, he was required to make due effort to set them, even though danger to himself was involved in the attempt. He was not responsible for the absence of the running-board, nor for the place the car occupied in the train. There was neither time nor opportunity to protest against passing over it. It is not claimed that he was negligent while on the car, but that he was in fault in going onto it. We do not think the fact that plaintiff attempted to pass over the car, with knowledge of its condition, ought to defeat his recovery. Whether he was negligent in fact was a question properly submitted to the jury. They found that he was not, and we are not disposed to disturb their verdict.

III. Appellant objects to various portions of the charge to the jury, and to the action of the court in refusing to give certain instructions asked by defendant. It is not necessary to consider these objections in detail. It is sufficient to say, in addition to what we have already said, that we discover no prejudicial error in any of the matters of which complaint is made.

AFFIRMED.

HUMMEL v. THE BANK OF MONROE.

MULLENS v. THE SAME.

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d90	357
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93	395
75	689
f107	513
75	689
137	509
75	689
f140	48
141	348

1. **Agency**: WHEN PRINCIPAL NOT BOUND BY AGENT'S KNOWLEDGE. The general rule that the principal is bound by the agent's knowledge is based on the duty of the agent to communicate to the principal his knowledge with reference to the subject of negotiation, and the presumption that he has performed that duty. But the rule does not hold where the circumstances are such as to raise a contrary presumption. And so, where defendant's cashier, not as cashier, but in his own personal capacity, by fraud procured the plaintiff to make to him his accommodation note, which he sold to another bank in exchange for a Chicago draft, which draft the defendant bank cashed through him as its cashier, *held* that, though the bank would have been liable to plaintiff if it had cashed the draft with notice of the fraud, yet, as it was against the cashier's purpose to convey to the bank his knowledge of the fraud, it was not liable to plaintiff as being chargeable with his knowledge as its agent.

2. **Trusts**: PROCEEDS OF FRAUD IN HANDS OF THIRD PARTIES. Where defendant's cashier, on his own personal account, fraudulently procured plaintiff to make to him his accommodation note, which note he negotiated for a draft, and cashed the draft as cashier of the defendant, using a part of the proceeds to pay a debt to the defendant, and for the residue taking cashier's checks, which were not negotiable, *held* that defendant, though having no actual or constructive notice of the fraud at the time the draft was cashed, would still be liable to the plaintiff for any of the proceeds of the draft remaining in its hands to the credit of the cashier; but that it could not be presumed, in the absence of proof, after the lapse of two years, that the cashier's checks had not been paid, or that there was any residue of the fund for which defendant would be liable.

Appeal from Jasper District Court.—HON. W. R. LEWIS, Judge.

FILED, MAY 11, 1888.

THESE causes involve the same questions, and may be disposed of in a single opinion. The appeal in each case is from the order sustaining a demurrer to the petition.

Bousquet & Earl, for appellants.

Winslow & Varnum, for appellee.

REED, J.—The substance of the petition in each case is that one R. C. Anderson, who at the time was defendant's cashier and general business manager, defendant being a corporation engaged in a general banking business, by means of certain false and fraudulent representations as to his financial condition and the uses to which he intended to devote the money to be obtained thereon, induced plaintiff to execute to him an accommodation promissory note for five thousand dollars; that he afterwards negotiated said note to an innocent purchaser, in the one case to the Des Moines National Bank, and in the other to the Bank of Newton, receiving therefor in each case the draft of the purchaser on its correspondent in Chicago, payable to his own order; that he subsequently indorsed the draft to defendant, which collected the money thereon, and appropriated the same to its own use; that in the purchase of said draft Anderson acted as the agent of defendant, and for it, and in its name, received the same, and did all of the business pertaining to the transaction; that at the time he knew and had in mind the fact that the draft was the proceeds of said note, and that the signature of plaintiff to the note had been obtained by the fraudulent means alleged; and that at the maturity of the note plaintiff was compelled to pay the same; and that he has not been reimbursed therefor except in the case of

1. AGENCY: when principal not bound by agent's knowledge.

Mullens by a small payment made by Anderson. The propositions on which plaintiff's case rests are (1) that as the note was obtained by fraud, plaintiff had a lien upon the proceeds in Anderson's hands for his indemnity against the note, or, in other words, was the equitable owner of the proceeds, and may pursue the same in the hands of any person who received them from Anderson with notice of his rights; and (2) that defendant is charged with knowledge of the facts out of which plaintiff's lien or ownership of the draft arose, by the knowledge of Anderson, which was present in his mind when he made the purchase for it.

For the purposes of the case the correctness of the first proposition will be conceded. With reference to the other proposition, it will be observed that the transaction in which the note was obtained in no manner pertained to the business of Anderson's office or agency, but was a mere personal matter between him and plaintiff, so that defendant is in no manner responsible for the fraud which was perpetrated on plaintiff in the transaction. It is also to be observed that there is no claim that any other officer or agent of defendant had any knowledge of that transaction, or that the draft was the proceeds of a note obtained from plaintiff. But the effort is to charge it with the liability on the ground solely of Anderson's knowledge. If the alleged fraud upon plaintiff had been perpetrated by another than Anderson, from whom he, acting for defendant, had purchased the draft with the knowledge alleged in this case, there probably would be but little doubt that under the settled rule of law defendant would be liable, and this whether the knowledge was acquired in the course of the transaction of making the purchase or independently of it, if it was present in his mind at the time. The general rule is that the principal is bound by the knowledge of his agent, and that rule is based on the duty of the agent to communicate to the principal his knowledge with reference to the subject of the negotiation, and the presumption that he has performed that duty. *Distilled Spirits*, 11 Wall. 356. There are

exceptions, however, to the rule. Cases may often arise in which the knowledge of the agent has been acquired under such circumstances that he is not at liberty to communicate it. This would be true in the case of an attorney or solicitor who, having acquired information in professional confidence in one transaction, is afterwards employed by another client with reference to the same subject-matter. In such case, as the agent could not, without a violation of the confidence of his former client, make the disclosure of his knowledge to his present principal, there can be no presumption that he did disclose it. *Lowther v. Carlton*, 2 Atk. 242; *Preston v. Tubbin*, 1 Vern. 287; *Hewitt v. Loosemore*, 9 Hare, 456; *Distilled Spirits*, *supra*. And we think another exception, founded on a similar reason, arises when the circumstances are such as to render it certain that the agent did not communicate his knowledge or information to his principal. The notice to the principal of such facts as were known to the agent, and were present in his mind at the time of the transaction, but the knowledge of which was not acquired in the business of the agency, is constructive. Ordinarily, the circumstances are such as to beget a presumption that the communication was in fact made. But when they are of such character that, according to all human experience and observation, the probability is just the reverse, it would be absurd to indulge that presumption. See *Kennedy v. Green*, 3 Mylne & K. 699. In the present case, if defendant had had actual notice when it took the draft of the facts known to Anderson, it would have been chargeable. But there is no probability that it would, with that knowledge, have taken it, and thereby incurred the liability. If he had communicated to it the facts within his knowledge before receiving the benefits which accrued to him under the transaction, all the objects he had in view would have been defeated. His connection with the transaction with plaintiff, and his object in disposing of the draft, were such that it is extremely improbable that he ever made the communication to it, and we think it cannot be charged with

constructive notice of the facts. It was contended by counsel for appellee that Anderson, being himself the seller of the draft, could not act as agent for defendant in its purchase. The rule, undoubtedly, is that one occupying a position of trust cannot bind his principal by a contract in which he has an adverse interest. But this question is not deemed of practical importance in the case. The question whether defendant is liable to plaintiff does not depend upon whether Anderson had authority to make that particular purchase, or on whether, by its subsequent action, it has ratified the purchase, but on whether it is chargeable with notice of the facts known to him.

In one of the causes it is averred that when Anderson indorsed the draft to defendant he applied a portion of the proceeds in satisfaction of an indebtedness he was owing it, and for the balance he issued to himself what is denominated "cashiers' checks," the same being non-negotiable instruments. And it was contended that the delivery of these checks did not constitute the defendant a purchaser for value of the draft, and that it is liable on that ground. It is doubtless true that defendant could have been held for any balance of the proceeds of the draft remaining in its hands to the credit of Anderson after it was informed of the fraud perpetrated by Anderson in obtaining the note, and that the draft was the proceeds of the note. But it does not appear from any averment of the petition that it was informed of these facts at any time before the commencement of the suit, which was several years after the transaction. Neither is it alleged that any portion of the proceeds then remained in its hands. The mere fact that the checks were not negotiable does not raise a presumption that they have not been paid.

2. Trusts: proceeds of fraud in hands of third parties.

We think the demurrers to the petitions were properly sustained.

AFFIRMED.

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DAY V. THE MILL-OWNERS' MUTUAL FIRE INSURANCE COMPANY.

1. **Corporations:** AMENDMENTS TO ARTICLES: ACKNOWLEDGMENT AND RECORDING. The articles of incorporation of a company organized for pecuniary profit can be amended only by an instrument signed and acknowledged by a person or persons duly authorized so to do, and recorded, in the same manner as is required for original articles by section 1060 of the Code.

2. **Pleading:** CONFESSION AND AVOIDANCE: CONFESSION BY IMPLICATION. A plea in avoidance must, for the purposes of the plea, confess the matter which it seeks to avoid; but such confession need not be in terms, but may be by implication; and such implication will arise by operation of law where the plea in avoidance does not deny any of the matter sought to be avoided.

3. **Pleading:** REPLY: CONFESSION AND AVOIDANCE: EFFECT OF IMPLIED CONFESSION ON IMPLIED DENIAL. Since the averments of an answer in which no counter-claim is pleaded are deemed to be denied by operation of law, and since a denial implied by law is governed by the same rules as one formally pleaded, and since inconsistent defenses may be stated in the same reply, it follows that the denial which is implied by law is not waived by pleading a defense in the reply which is inconsistent therewith. And in this case, where defendant pleaded a certain fact in defense, and plaintiff, in his reply, pleaded matter in avoidance, without fully admitting such defense, *held* that, while he must be regarded as admitting it for the purposes of his plea in avoidance, yet it is not to be regarded as admitted as against the denial which arose by operation of law, so as to relieve the defendant from the burden of proving it. (See opinion for cases cited).

4. **Fire Insurance:** MUTUAL COMPANY: ESTOPPEL OF MEMBERS TO DENY ARTICLES OF INCORPORATION. A member of a mutual insurance company, in an action to recover upon a policy therein, where the defense is made that he has failed to comply with an amendment to the articles of incorporation, is not estopped from pleading that such amendment was never legally adopted and was not a part of the contract, unless it is shown that he knew of such amendment and contracted with reference thereto.

Appeal from Tama District Court.—HON. L. G. KINNE, Judge.

FILED, MAY 11, 1888.

THIS is an action on a policy of insurance issued by defendant. There was a trial by jury, and verdict and judgment for plaintiff. The defendant appeals.

S. D. Nichols, for appellant.

Charles A. Clark, for appellee.

ROBINSON, J.—The petition alleges that defendant is a corporation for pecuniary profit, duly organized under the laws of the state of Iowa; that on the fifteenth day of December, 1884, it issued the policy in suit, and thereby insured Crenshaw & Day against loss or damage by fire or lightning, to the amount of three thousand dollars, on their grist-mill, including building and machinery, said policy to be in force so long as the assured should remain members of the defendant corporation. The loss of the property by fire while the policy was in force, the refusal of defendant to pay the amount of the loss, and the assignment of the claimt herefor to plaintiff, are also alleged. The answer of defendant admits the allegations of the petition, but denies liability for the loss in question. As a defense it alleges that it is a mutual insurance company, and that all of its policy-holders are members of it, mutually bound by its articles of incorporation and by-laws; that said Crenshaw & Day became members of defendant when said policy of insurance was issued, and became bound to comply with all the requirements of the articles of incorporation of defendant, the fifteenth article of which is in words as follows: "Should any mill insured in the company be shut down, or remain idle, from any cause whatever, more than twenty days continuously, it shall be the duty of the insured to notify the secretary of the company of such fact, and of the length of time such stoppage will probably continue, giving the cause thereof, and, if he fails so to do, his policy shall be considered suspended from the expiration of such time until the mill shall resume work, or it is reinstated by the secretary." The answer further alleges that when the mill in controversy was

destroyed, to-wit, March 5, 1885, it was, and had been for more than twenty days, shut down and idle; that notwithstanding that fact the assured had failed to give any notice of said stoppage, and defendant was ignorant of it until after the fire; that in consequence of said stoppage, and failure to give notice, the policy was suspended at the time of the fire, and defendant is not for that reason liable for the loss. Plaintiff filed a reply, which contains four divisions. A demurrer was sustained as to the second division, and overruled as to the others.

I. In order to maintain its defense, it was necessary for defendant to show that the alleged article 15 set out in its answer had been legally adopted, and was in force when the policy in suit was issued, and when the loss occurred. A writing purporting to contain the articles of incorporation of defendant, including the one in question, was offered in evidence. The plaintiff objected to its introduction, on the ground that it was immaterial and incompetent, and because the original articles and amendments offered show that they were not adopted in the manner and form required by law. This objection was sustained. Defendant then offered the minutes of the annual meeting of its members to show the adoption of the amendments. An objection on the grounds just named was sustained to these minutes. The writing offered to prove the amendments, including article 15, was not acknowledged, nor was it shown to have been approved by the attorney general and auditor of state. It is contended by appellant that it was organized under the provisions of section 1160 of the Code, and that its articles of incorporation were not required to be acknowledged by the incorporators, nor approved by the officers named. It claims that the original articles were adopted in 1875, and that the article in question was adopted in January, 1884. Appellee insists that defendant was incorporated under the provisions of chapter 1 of title 9 of the Code, as modified by other provisions of the same title, and that

1. CORPORATIONS: amendments to articles: acknowledgment and recording.

the associations and companies organized under section 1160 are not corporate bodies. It is admitted by the pleadings that defendant is a corporation for pecuniary profit. Section 1060 of the Code requires such corporations to adopt articles of incorporation, which must be signed and acknowledged by the incorporators and be recorded. This provision was in force when article 15 is said to have been adopted. It is claimed by appellant that, while the law required original articles of incorporation adopted in 1884 to be acknowledged, there was no such requirement as to new articles; hence that the adoption of article 15 could be proven by the signatures of the officers of defendant thereto attached, and by the books of the company showing the action of its members. We do not think this claim can be sustained. It is the purpose of the statute to give to all persons means of ascertaining the general nature of the business to be transacted by such corporations, and the powers they may use in prosecuting it. But the business and powers of a corporation might be greatly modified, or even changed altogether, by means of amendments to its articles of incorporation. The reasons which make it desirable for the original articles to be acknowledged and recorded apply with equal force to amendments. This is shown by the facts of this case. The instrument offered to show the adoption of the amendments to the original articles includes, not only the article in controversy and other amendments, but also what purports to be all the articles of incorporation and by-laws of the company. It appears that, if this instrument is what it is claimed to be, nearly all the articles were amended, and a new one included. It is in the nature of a revision of the articles and an adoption of all as revised, but is not acknowledged. It does not show who is responsible for it, nor is it signed by any one. The only thing in the nature of an authentication attached to it is a certificate in the following language: "This certifies that at the annual meeting of the Mill-Owners' Mutual Fire Insurance Company of Iowa, held in the city of Des Moines

January 16, 1884, the articles of incorporation and by-laws of the company were amended as above described. S. D. Nichols, president. J. G. Sharp, secretary." This does not purport to be, and is not, any part of the articles. The amendments are not in any manner pointed out. We conclude that the articles of incorporation of a company organized for pecuniary profit can be amended only by an instrument signed and acknowledged by a person or persons duly authorized so to do, and recorded.

II. The first division of the reply alleges in substance that defendant, pursuant to its articles of incorporation, adjusted the loss in controversy, and made an assessment on its members to pay the same, and that said assessment was collected. The division concludes with the following paragraph: "And plaintiff submits that, by reason of the premises hereinbefore set forth, the defendant can neither plead nor maintain any defense under the alleged article fifteen of its articles of incorporation." The third division alleges in substance that the failure to operate the mill during the time it is alleged to have been idle was due to the freezing of the head-race to such a depth that it did not furnish water sufficient to operate the mill, and that it was impossible for plaintiff "to comply with said alleged article fifteen, and notify defendant's secretary of the length of time such stoppage would probably continue," because of the uncertainty of the weather. The fourth division of the reply alleges in substance that the policy in suit was in force at the time of the loss, for the reason that it was not suspended in accordance with the provisions of the defendant's alleged articles of incorporation. We are not required to determine the sufficiency of the defenses pleaded in the reply, excepting in so far as it was raised by the demurrer, which is in the following words: "Now comes defendant and demurs to plaintiff's reply to defendant's answer, and to each and every count thereof, for the following reasons, to-wit: (1) Plaintiff pleads matter in each and every count or division of his said reply which he claims avoids the defenses to plaintiff's claim

2. PLEADING: confession and avoidance: confession by implication.

set up in defendant's answer, and yet fails to admit or confess the matter of defendant's answer which he seeks to avoid. (2) Plaintiff in his said reply fails to admit any part of defendant's claim as made in the answer to plaintiff's petition, but seeks to avoid the same by pleading new matter in avoidance, without confessing or admitting the facts which he seeks to avoid." It is contended by appellant that the court erred in overruling this demurrer, or that each of the divisions in question contains such a confession of the adoption of article 15 in controversy as rendered proof thereof unnecessary. We are of the opinion that the defense set up in each of said divisions is in the nature of a plea in avoidance, and we are therefore required to determine the nature and effect of the confession which must of necessity be included therein if the ruling on the demurrer was correct. Under our system of pleading, all material allegations of the answer which are not admitted in the pleadings are deemed to be denied by operation of law, excepting "where a counter-claim is alleged, or where some matter is alleged in the answer to which the plaintiff claims to have a defense by reason of some fact which avoids the matter alleged in the answer." Code, sec. 2665. When a reply to an answer which does not contain a counter-claim must be filed, it shall consist of "any new matter, not inconsistent with the petition, constituting a defense to the matter alleged in the answer, or the matter in the answer may be confessed, and any new matter alleged not inconsistent with the petition which avoids the same." Code, sec. 2666. It is further provided that "each affirmative matter of defense in the reply shall be sufficient in itself, and must intelligibly refer to the part of the answer to which it is intended to apply." Code, sec. 2667. In this case no counter-claim is pleaded by defendant, and but one defense. Each division of the reply in question must be construed to refer to the entire answer, and to be governed by the last provision of that part of section 2666 which we have quoted. Our Code does not change the requirements of the common law as to a plea in avoidance.

Anson v. Dwight, 18 Iowa, 241. It must in effect, and for the purposes of the plea, confess that, but for the matter pleaded in avoidance, the cause of action or defense to which it applies would entitle the party pleading the same to succeed thereon. But this confession need not be in terms, but may be by implication. *Anson v. Dwight, supra; Morgan v. Hawkeye Ins. Co.*, 37 Iowa, 359. It is sufficient if it "give color" to the alleged right of the adverse party, and no more than this was required at common law. Steph. Pl. 202; 1 Chit. Pl. 525. "Every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse." Steph. Pl. 217. No denial of the allegations of the answer was contained in any of the divisions of the reply under consideration. We therefore conclude that they were admitted, and that the demurrer was properly overruled.

III. Did the divisions of the reply we have just considered so far admit that article 15 was in force and applied to the loss in question as to make other proof of the fact unnecessary? It must be remembered in this connection that a general denial in a reply, where no counter-claim is pleaded, is not admissible under our practice. The averments of the answer in such case are deemed to be denied by operation of law. It must also be remembered that "inconsistent defenses may be stated in the same answer or reply." Code, sec. 2710. There is no legal objection to the stating of a defense in a reply which is inconsistent with the general denial implied by law, nor is such denial waived by the pleading of a defense inconsistent therewith. A denial implied by law is governed by the same rules as one formally pleaded. The right to plead inconsistent defenses is as broad in the case of a reply as in that of an answer. When such defenses are in issue, the confessions made in the pleading of one, where a right is not thereby fully admitted, cannot be treated as evidence to disprove another. We have so held as to answers. *Barr v. Hack*, 46 Iowa, 310; *Herzman v. Oberfelder*,

3. PLEADING: reply: confession and avoidance: effect of implied confession on implied denial.

54 Iowa, 85; *Heinrichs v. Terrell*, 65 Iowa, 28. The same rule governs replies. Some of the language used in *Meadows v. Hawkeye Ins. Co.*, 62 Iowa, 387, may seem to be in conflict with the views we now express. But the reply in that case contained an explicit confession of a fact which, in the absence of proof of matters in avoidance, established the defense set out in the answer. It confessed an actual right by positive averment, not a colorable right by implication. In this case there is no admission that article 15 ever became a part of the contract in suit. The admissions are by implication only, and cannot be given greater weight than is due to the language used to express them, excepting that effect which the law gives to them for the purposes of the divisions of the reply in which they are found. To speak of something which another claims to be true as "an alleged fact" is not to admit that it is a fact. While the reply does not deny the legality of article 15, it makes no stronger admission than to speak of it as an "alleged article." This was not evidence to sustain the claim of defendant. *Platner v. Platner*, 66 Iowa, 382. To hold otherwise would be in effect to deny in many cases the right to plead inconsistent defenses. This would be contrary to the policy of the law. It often happens that the facts involved in a matter set out by way of defense in an answer are peculiarly within the knowledge of the party pleading it. The adverse party may have a good defense to such matter on the merits, but from lack of knowledge of the facts may not be able to determine before the trial which of two or more defenses can be maintained. In such case he should not be compelled to elect to stand on one defense, at the risk of abandoning, without fault on his part, the only one which could be maintained. We conclude that there was nothing in the reply which relieved defendant of the burden of proving that article 15 was a part of the contract in suit. It offered no competent evidence tending to support that issue; hence the district court was justified in directing the jury to return a verdict for the plaintiff.

IV. It is urged that defendant was a mutual insurance company, and that, by virtue of the policy in suit, Crenshaw & Day became members of defendant, and as such were estopped from denying that its articles of incorporation were legally adopted and in force as a part of the contract in suit. We do not think that question is presented by the record. It is not claimed that Crenshaw & Day knew of article 15, and contracted with reference to it. This being the case, the plaintiff, as assignee, had a right to insist, as his assignor might have done, that article 15 was not a part of the contract, and to require proof of the fact. The views we have expressed dispose of all the questions involved in the record. We discover no error of which complaint is made, and the case is therefore

4. Fire insurance: mutual company: estoppel of members to deny articles of incorporation.

AFFIRMED.

HALVERSON v. BROWN *et al.*

Fraudulent Conveyance: GOOD-FAITH PURCHASER FROM FRAUDULENT GRANTEE: PRIOR ATTACHMENT. One who purchases land from a fraudulent grantee, with neither actual nor constructive notice of the fraud, and for a valuable and adequate consideration, will hold it against the creditors of the original fraudulent grantor; and the fact that they may have attached the land as the property of their debtor is immaterial, unless such purchaser has notice thereof; and the entrance of the attachment in the incumbrance book as against their debtor is not constructive notice to such purchaser of any cloud upon the title of his immediate grantor.

Appeal from Buena Vista District Court.—HON. GEORGE H. CARR, Judge.

FILED, MAY 12, 1888.

ACTION in chancery to set aside and declare void certain deeds on the ground that they were fraudulently made to defeat and delay plaintiff in the enforcement of a judgment against one of the defendants, who, it is alleged, was the owner of the land conveyed. A decree was

entered granting the relief prayed for in plaintiff's petition. Defendants appeal.

Robinson & Milchrist, for appellants.

F. H. Helsell, for appellee.

BECK, J.—I. The evidence shows the following facts, which are not disputed: The defendant Ole O. Brown was the owner of the land in controversy, which, on the fifteenth day of November, 1881, with his wife, Anlany Brown, who is also a defendant, he conveyed by deed of warranty to Ole T. Hongstuen. On the sixth day of September, 1886, Hongstuen and wife conveyed the land to defendant Anlany Brown by quit-claim deed. On the twenty-sixth day of August, 1886, she entered into a contract for the sale of the land to defendant Ward, who obligated himself to pay one thousand dollars cash on the execution of the contract, and two thousand dollars on the seventh of September following. On that day she conveyed the land to Ward, pursuant to the contract. September 2, 1886, plaintiff instituted an action against Ole O. Brown, and caused an attachment to be issued, which was, on the same day, levied upon the land in question in this action. On the twenty-sixth day of October, 1886, judgment was rendered therein against defendant Ole O. Brown. November 4, 1886, this action was commenced. Plaintiff insists that the conveyances to Hongstuen, Anlany Brown and Ward are fraudulent, in that they were made for the purpose of defeating Ole O. Brown's creditors.

II. It may be assumed, without so deciding, that the purposes of the conveyances to Hongstuen and Anlany Brown were fraudulent, as claimed by plaintiff. But we reach the conclusion that on the part of Ward the purchase of the land and conveyance to him were in good faith, and for a consideration equaling the true value of the land. On the day the contract for the purchase of the land was entered into between him and Anlany Brown, he paid her one thousand dollars, and on the seventh day of September, the day the deed was executed to him, he paid two thousand dollars, as promised in

the contract. These facts are established by the direct and positive testimony of himself and the Browns, husband and wife. There is no direct contradictory evidence on this point. Counsel for plaintiff insists that circumstances tend to raise an inference that the testimony of these witnesses is untrue, as that Ward does not show with sufficient clearness from what source he obtained the money paid for the land, and Brown does not fully account for the disposition of it, and other matters of this kind. But we think these circumstances are so far explained that no reasonable inference of fraud can be drawn therefrom. It is not shown that Ward had actual notice of the attachment when he made either the first or the last payment on the land. He directly and positively testifies that he had not; and as we understand plaintiff's counsel to concede that, as the attachment was not, as it could not have been, entered in the incumbrance book against Anlany Brown, Ward was not chargeable with constructive notice thereof. He is therefore to be regarded as a purchaser for a valuable consideration, without notice of the claim or equity of plaintiff.

III. Counsel for plaintiff insists that Ward had knowledge of facts which should have put him on inquiry which would have resulted in disclosing plaintiff's claim and attachment. Conceding that such knowledge would charge him with notice of the attachment, which we do not decide, we do not discover evidence establishing it.

Upon these considerations we reach the conclusion that the evidence fails to establish fraud as to Ward, and that his title to the land must stand free of the claim of plaintiff.

The decree of the district court is reversed, and a decree will be entered in this court dismissing plaintiff's petition.

ROBINSON, J., having been of counsel in this case, took no part in its determination.

JOERNS v. LA NICCA.

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1. **Judgment: BY DEFAULT: SETTING ASIDE: TERMS: APPLICATION OF RULE.** Before a defendant against whom a judgment upon default has been entered is entitled to have it set aside, he must show by affidavit (1) a meritorious defense to plaintiff's claim, or some portion of it; and (2) a reasonable excuse for having made the default. But where the court, upon hearing the motion to set aside the judgment, required the plaintiff to remit a portion of it, and, upon that being done, overruled the motion, *held* that such order implied a finding of facts showing a sufficient excuse for the default; for otherwise defendant would not have been entitled to any relief; also that the granting of such partial relief implied a finding, as matter of law, that defendant had shown a meritorious defense as to a part of plaintiff's claim. And it appearing from the record that such finding of law was correct, and the finding of fact being presumed to be justified by the evidence, *held*, further, that the order overruling the motion was erroneous, because inconsistent with these implied findings of the court. [SEEVERS, J., *dissenting*].

2. ——: ——: ——: **SHOWING OF MERITS: EVIDENCE.** Upon the hearing of a motion to set aside a judgment by default, no evidence can be received as to the merits of the defense shown, except the affidavits filed in support of the motion. If that showing is sufficient in law, it must be accepted for the purposes of the motion. Whether it is true in fact must be determined upon a new trial, if one is granted.

3. **Change of Venue: ERROR: JURISDICTION: APPEAL.** If it be error to grant a change of venue for the trial of a cause, without notice to the defendant, after a default has been entered against him, such error does not affect the jurisdiction of the court to which the cause is removed, and it cannot be reviewed upon an appeal from a judgment rendered in that court.

Appeal from Dubuque District Court.—HON. C. F. COUCH, Judge.

FILED, MAY 12, 1888.

Joerns v. La Nicca.

THIS is an appeal by defendant from an order of the district court overruling a motion to set aside a judgment which was entered by default.

Fouke & Lyon, for appellant.

Henderson, Hurd & Daniels, George Crane and *W. G. Joerns*, for appellee.

REED, J.—Plaintiff is a daughter of defendant. The allegations of the petition in substance are that her mother, at the time of death, which occurred in Switzerland in 1859, was the owner of certain personal and real property situated in that country, which descended in equal shares to her and a sister, they being the sole surviving children. That, she being a minor, a guardian of her person and property was appointed by the tribunal of Switzerland having jurisdiction of such matters, her domicile at the time being in that country. That in 1869, the defendant, who was then a resident of this state, applied to said tribunal to be appointed guardian of her person and property, and for the discharge of the former guardian, and that such proceedings were had that the former guardian was discharged, and defendant appointed in his stead. That he subsequently brought her to Dubuque, where she has since resided, and that he received large sums of money which came into his hands as such guardian, being the proceeds derived from the sale of said property; and that at the time of her mother's death, he had in his hands the sum of eighteen hundred dollars belonging to the mother, which he derived from the sale by him of certain lands in Dubuque county which belonged to the mother, he having a power of attorney from her to make such sale, and that one-third of the amount descended to her upon the death of her mother, and that he has never in any manner accounted to her for any portion of the moneys so received by him, although she has attained her majority. Her prayer is that the amount due her be

ascertained, and that she have judgment therefor, and that the same be made a special lien upon certain real estate belonging to defendant, which, she alleges, was paid for in part with the moneys so received by him. The action was brought originally in the circuit court, and defendant was duly served with an original notice. At the first term of the court after the service of the original notice no action was taken in the cause, and it was continued generally; and at a subsequent term, no appearance having been made by defendant, he was adjudged to be in default, but no final judgment was rendered at that term. At a subsequent term plaintiff filed a motion for a change of place of trial, on the ground of the alleged prejudice of the judge, which was sustained, and the cause transferred to the district court, and at a subsequent term of that court the proofs in support of the cause were submitted, and judgment was entered for plaintiff as prayed in the petition. At the same term defendant filed his motion to set aside the default, the grounds of which are: "(1) The court had no jurisdiction to grant a default, the change of venue having been obtained without any notice to defendant. (2) Said change of venue was taken and default entered, in violation of the promise of the attorney of plaintiff, while said action was pending in the circuit court, to dismiss the said suit. (3) The decree was entered upon *ex-parte* testimony which is chiefly hearsay. (4) Because the testimony was taken by and before her husband and attorney, and is the result of a family party; the husband dictating as attorney to the wife, and then acting as qualifying officer. (5) For the reasons stated in addition in annexed affidavit." In the affidavit filed in support of the motion, defendant testified that after the original notice was served, and before the default was entered, he had a conversation with plaintiff's husband, who is also one of her attorneys, and that in that conversation the husband promised to dismiss the suit, and that, relying on that promise, he neglected to employ counsel, or to appear and defend in the action, and that he had no knowledge

or information that such promise had not been performed, or that the suit was still pending, until advised, a day or two after the judgment was rendered, of its rendition. The affidavit, and an additional one subsequently filed, also contained a lengthy statement with references to the moneys received from the property in Switzerland. The tendency of this statement is to show that the amount actually due plaintiff on that account is much less than that claimed by her in her petition and awarded by the judgment. The affidavit also avers that, while the title to the Dubuque county lands mentioned in the petition was in defendant's wife, it in fact belonged to him, and that the title was placed in her as a matter of convenience, and that neither she nor her heirs had any interest in the money derived from the sale of it. In resistance of the motion, plaintiff filed the affidavit of her husband, in which he denied that he had ever made the statement or promise to dismiss the action testified to by defendant. She also filed a transcript from the record of the probate court of Switzerland, and other documentary evidence, the tendency of which was to show that defendant had received many items of money from the Switzerland property in addition to those mentioned in his affidavits. On the hearing of the motion the court required plaintiff to remit $2,758.10 of the judgment, and, a remittance of that amount being filed, the motion was overruled. It was conceded by counsel for appellee on the argument that the amount so required to be remitted was the sum awarded by the judgment on account of the money received by defendant for the Dubuque county lands. The proceeding to set aside the default is under Code, section 2871, which is as follows: "Default may be set aside on such terms as the court may deem just, among which must be that of pleading issuably and forthwith, but not unless an affidavit of merits be filed, and a reasonable excuse shown for having made such default, * * *" Under this provision, defendant, before he will be entitled to the relief demanded, must do two things, viz.: (1) He must show by his affidavit that he

has a meritorious defense to plaintiff's claim, or to some portion of it; and (2) he must show a reasonable excuse for having made the default. It is manifest from the language of the provision that there can be no inquiry either as to the sufficiency or the competency of the evidence upon which the judgment was rendered. We are clear, also, that there is nothing in the claim that the district court did not have jurisdiction to enter the judgment. The application for the change of venue was a matter within the jurisdiction of the court to which it was addressed. The court may have erred in granting the change, but its order was not void, and the question cannot be reviewed on this appeal. We are also of the opinion that no evidence in addition to that offered by defendant in support of the motion can be received as to the merits of the defense. That is, if the affidavit of merits shows a defense good in law, it must in this proceeding be accepted, and there can be no further inquiry as to the truth of the defense; but that question is left for determination upon the trial, if a retrial is granted. By the order requiring plaintiff to remit a portion of the judgment, the district court in effect determined that as to that item defendant's affidavit showed a meritorious defense. The order also implies a finding by the court that the showing in excuse of the default is sufficient, for it determines that to that extent defendant was entitled to relief. But, unless reasonable excuse was shown for having made the default, he was entitled to no relief whatever. In other words, it is necessarily implied from the order that the court determined the question of fact as to whether plaintiff's husband and attorney promised to dismiss the action in defendant's favor. The question for determination, then, is whether the showing made in defendant's affidavits of merits constitutes a defense to plaintiff's claim, and we think that question should be answered in the affirmative. If his statement shows the actual amount of money received by him from the property in Switzerland, the claim made by plaintiff in

her petition, and the amount awarded her by the judgment, is largely in excess of the amount actually due her. And this is true, leaving out of the account the claim made by defendant that, under the laws of Switzerland, he was entitled to the use of the property until she attained her majority. We think, therefore, that the court erred in overruling the motion to set aside the default, and the order will accordingly be

REVERSED.

SEEVERS, J., (*dissenting*). Upon what grounds the district court proceeded when it required the plaintiff to remit a portion of the judgment the record fails to disclose, and I am forced to the conclusion that a finding of the court must be implied to the effect stated in the opinion. It seems to me error is assumed or presumed, and clearly such is not the rule. The presumption must be indulged that the court granted all the relief the defendant was, in the judgment of the court, entitled to.

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NELSON V. WILSON.

1. **Appeal**: QUESTION NOT RAISED BELOW: FAILURE OF CONSIDERATION. In an action for money to be paid upon the delivery of a release, no claim was made below that the release, if executed and delivered, would have been a legal nullity, and that hence the agreement to deliver it was no consideration for the promise to pay. *Held* that that question could not be raised for the first time on appeal.

2. **Tender**: CONDITION PRECEDENT TO ACTION. No action *at law* can be maintained for money to be paid upon the delivery of a release, unless there has first been a delivery or tender of the release. No mere offer to execute and deliver it is sufficient, even though the defendant has declared in advance that he would not accept it. (Compare *Courtright v. Deeds*, 37 Iowa, 503). In equity a different rule obtains.

Appeal from Wright District Court—HON. S. M. WEAVER, Judge.

FILED, MAY 14, 1888.

Nelson v. Wilson.

THIS is an action at law for the recovery of a balance alleged to be due of the purchase price of an interest in a tract of land which was sold and conveyed to defendant by plaintiff's mother, it being the agreement of the parties that the consideration should be paid to plaintiff. The verdict and judgment were for plaintiff, and defendant appeals.

B. P. Entriken and *Nagle & Birdsall*, for appellant.

Pillsbury, Moats & Moats, for appellee.

REED, J.—Plaintiff is the illegitimate son of Mary Nelson, who is now the wife of defendant. She was formerly the wife of Anton Nelson, by whom she had two children. At the time of his death Anton Nelson was seized of a forty-acre tract of land, which descended to his widow and children. After the marriage of defendant with the widow, and after a child had been born to them, they entered into a contract for the sale and purchase of her distributive share of the land. She was desirous of making such provision for plaintiff out of the property as would place him on an equality with the children of Arthur Nelson,—whose interest in the property defendant purchased from their guardian,—and it was agreed that the amount which defendant was to pay under the contract should be paid to him. Defendant was desirous that the whole of the estate of which he should be seized at his death should, after the death of his wife, in case she survived him, be secured to his own child, and it was a condition of the contract that plaintiff should execute and deliver to him an instrument releasing all the interest which he otherwise would acquire by descent from his mother in her distributive share of defendant's estate, in case she should survive him. In pursuance of the contract, Mrs. Nelson executed to defendant a conveyance of her interest in the property. The amount which defendant agreed to pay plaintiff was three hundred dollars, which the evidence shows was considerably in excess of the value of

the interest in the property acquired by him. He paid one hundred dollars of the amount, and the action is for the recovery of the balance. Plaintiff did not, before bringing the action, execute and tender the writing contracted for, nor has he since done so. There was evidence, however, tending to prove that he offered to execute and deliver any instrument which should be deemed sufficient for the purpose intended, and which should be satisfactory to defendant, but the latter had in the meantime been advised that no instrument could be executed which would have the effect intended, and he declined to either pay the money or proceed further in the matter.

I. It was contended on the argument that, as plaintiff had no interest, either present or in expectancy, in the estate of which defendant might be seized at his death, his release would pass nothing, and consequently the covenant that he should give such release afforded no consideration for defendant's promise to pay the money. But no such question appears to have been passed upon by the court below. The parties appear to have regarded the contract as valid in all its provisions, both in their pleadings and on the trial. The only defense pleaded by defendant was that the covenant to execute the release was dependent, and that it had not been performed. If the position of counsel as to the effect of the release, or, rather, its non-effect, is correct, it would follow that there was a partial failure of the consideration of defendant's promises to pay the money, which can be taken advantage of only under proper pleading alleging such failure.

1. APPEAL: question not raised below: failure of consideration.

II. The district court instructed the jury that plaintiff would be entitled to recover upon proof of an offer by him to execute the release. This we think is erroneous. The covenants are mutual and dependent. The execution of the release is what the defendant contracted for. That is, he agreed to pay the money, in part at least, for it; and plaintiff's undertaking, or, rather, the covenant in the

2. TENDER: condition precedent to action.

agreement which he is seeking to enforce, was that he would execute and deliver it upon the payment of the money. Now plaintiff is seeking by this action to enforce the contract, but he will not be entitled to recover the money until he has done the particular thing which he agreed to do as the consideration for its payment. Any offer on his part to perform, short of a tender of the thing he agreed to deliver, is insufficient. It makes no difference that defendant declared in advance that he would not accept the release; for, as plaintiff's covenant was to execute and deliver it, and defendant was bound to pay the money only when that was done, he would not be put in default by anything short of that, or, at least, until a tender of performance was ready. This is the doctrine of *Courtright v. Deeds*, 37 Iowa, 503, and it is the rule when relief is sought in actions at law. When relief is sought in equity a different rule obtains. But in actions in equity the court can by the decree grant the plaintiff such relief as he shows himself entitled to, upon such conditions as will fully protect the rights of the defendant. *Winton v. Sherman*, 20 Iowa, 295. For this error the judgment will be

REVERSED.

GOODE v. GARRITY *et al.*

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Fraudulent Conveyance: ACTION TO SET ASIDE: FOUNDATION FOR. Until a creditor in some manner obtains a lien on his debtor's property, or has exhausted his remedies at law, or done what is equivalent thereto, he cannot question in equity a fraudulent conveyance or incumbrance of his property made by such debtor, and have the same set aside. Accordingly *held* that the relief granted by the decree in this case (see opinion) was in excess of plaintiff's rights. (*Buchanan v. Marsh*, 17 Iowa, 494, *followed*; *Joseph v. McGill*, 52 Iowa, 127, *distinguished*).

Appeal from Polk District Court.

FILED, MAY 15, 1888.

Goode v. Garrity.

THIS action was brought against J. F. Garrity, James Garrity, C. M. Mathews and W. H. Welch. There was a judgment for the plaintiff, and the Garritys alone appeal.

Barcroft & Bowen, for appellants.

E. J. Goode, for appellee.

SEEVERS, C. J.—It is stated in the petition that J. F. and James Garrity executed certain promissory notes to the plaintiff, and had disposed of their property to defraud their creditors; that the defendant Mathews purchased certain property of J. F. Garrity, and obtained from the latter certain promissory notes, secured by mortgage on real estate, and thereby certain indebtedness which Garrity owed Mathews had been paid and satisfied; that said Garrity, claiming to be acting for Mathews, sold and transferred to the defendant Welch certain notes and accounts, for which Welch agreed to pay Garrity, and that Mathews had no interest in said notes and accounts; that James Garrity is the owner of certain described real estate, and executed a mortgage thereon to Matthews for the purpose of defrauding the creditors of the former; that said Garrity has a large amount of personal property and credits, and other real estate, which should be subjected to the payment of his debts, "which plaintiff cannot discover without answer and discovery from James Garrity;" that the "Garritys and Mathews fraudulently combined and colluded together to cover up and conceal the property-rights and credits of said Garritys to prevent the same from being reached by their creditors, and subjected to the payment of their debts, whereby the plaintiff especially has been injured and defrauded, and can only obtain relief in equity." The relief asked is judgment for the amount due on the notes payable to the plaintiff executed by the Garritys; that an attachment may issue against the Garritys, and that they

make discovery of their property; that said accounts and credits transferred to Welch be adjudged to be the property of Garrity, and that the amount due from Welch for the purchase and assignment of the same is subject to attachment at the suit of plaintiff in the hands of Welch towards the payment of plaintiff's indebtedness from said Garritys; that the real estate be decreed subject to the plaintiff's claim, free from the mortgages thereon; and that the plaintiff have such other and further relief as he in equity may be entitled to. Appellants contend that, conceding that all the allegations of the petition have been established, with possibly a single exception, yet the plaintiff is not entitled to the full measure of relief granted him.

I. This action was tried in the district court as an equitable proceeding, and it will be so tried and determined in this court. The district court rendered judgment for the plaintiff, and also that the "plaintiff is entitled to subject the notes and accounts in the hands of said Welch, which accrued prior to April 30, 1885, to the payment of his said debt under his attachment and garnishment of said Welch herein, or a sufficient amount thereof to satisfy his said debt, interest and costs." And it was also adjudged that "plaintiff be subrogated to all the rights of J. F. Garrity in said notes and accounts, * * * and he may proceed under his attachment and garnishment herein to subject the same to the payment of his debt; * * * and said Welch is adjudged to hold the same subject to plaintiff's said claim." It is to this portion of the judgment that counsel for appellants object. It may possibly be inferred from the language used by the court that there was evidence tending to establish the recited material facts. We, however, have been unable to discover any evidence in the record which tends to establish that Welch was garnished, or that the makers of the notes or persons indebted on the accounts transferred to him were garnished. Nor do we understand it to be alleged in the petition that plaintiff had obtained a lien on any specific property by attachment and garnishment.

Counsel for the appellants concede that the plaintiff in an action at law or equitable proceeding is entitled to an appropriate order subjecting the attached property to the payment of the judgment, but, as we have said, the contention of counsel in the case is that it does not appear from the allegations of the petition, nor is it established by the evidence, that the plaintiff at any time obtained any lien upon the notes and accounts in the hands of Welch, and therefore the plaintiff is not entitled to such relief; and we think this position must be sustained, for the reason that this court adopted such rule many years ago in *Buchanan v. Marsh*, 17 Iowa, 494. It is there said: "The rule is, so far as we know, without exception that the creditor must have completed his title at law by judgment, if not by execution, before he can question the disposition of the debtor's property." In addition to the authorities referred to in the cited case, see Bump Fraud. Conv. 511, and authorities cited in note. It will be conceded that if the plaintiff had obtained a lien on the property in the hands of Welch by attachment or otherwise, he could in this proceeding remove any clouds cast on his title or right. Possibly, if he had obtained such lien he could have so alleged in an amended or supplemental petition, and obtained appropriate and sufficient relief, if for no other reason than to prevent a multiplicity of suits. But until a creditor in some manner obtains a lien on his debtor's property, or has exhausted his remedies at law, or done what is equivalent thereto, he cannot question in equity a fraudulent conveyance or incumbrance of his property made by such debtor, and have the same set aside. *Joseph v. McGill*, 52 Iowa, 127, is not in conflict with this view.

The judgment of the district court must therefore be modified and affirmed, and the parties, or either of them, are entitled to a decree in this court if they so elect.

MODIFIED AND AFFIRMED.

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SPELMAN V. GILL.

1. **Appeal:** QUESTION NOT RAISED BELOW: KIND OF PROCEEDINGS. This cause having been begun and tried in the court below as a law action, without any objection on the part of defendant, he cannot, on appeal, be heard to complain that it should have been tried as an action in equity. He should have moved in the trial court to transfer it to the equity calendar, as provided by Code, section 2514.

2. ——: RULINGS ON EVIDENCE: NO EXCEPTIONS. The admission of incompetent evidence against appellant's objection is no ground for a reversal, where the record does not show that exceptions were taken and preserved to the rulings of the court admitting the evidence.

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, MAY 17, 1888.

PLAINTIFF seeks to recover of defendant four hundred and twenty-five dollars alleged to be due on account of the sale of real estate. The case was tried in the district court to a jury, and verdict and judgment rendered for plaintiff. The defendant appeals.

Cole, McVey & Clark, for appellant.

W. S. Sickmon and *St. John & Whisenand*, for appellee

ROBINSON, J.—The plaintiff alleges that "upon and prior to the seventh day of December, 1885, she was the owner of the following-described real estate, to-wit: The southeast quarter of the southwest quarter of section 30, township 81, range 26; that upon said date she entered into a verbal agreement with the defendant, Darby Gill, whereby said Darby Gill was to act for her in the selling of said land, accounting for the entire

proceeds thereof to this plaintiff, and that, to facilitate such agreement, she, in connection with her husband, Paul Spelman, conveyed said land to said Darby Gill, to be by him thereafter sold as aforesaid; that subsequently to said time, and on the eighth day of January, 1886, the said Darby Gill sold and conveyed said land to one Edward Spelman for a consideration of nine hundred dollars." Plaintiff further alleges that, after deducting all credits to which defendant is entitled, there is due from him the sum of $402.66. Defendant admits the conveyance, but avers that it was made in pursuance of an absolute sale, and that he has fully paid the purchase price. Although numerous errors are assigned by appellant, but two questions are discussed.

I. It is first objected on behalf of appellant that the district court "had no jurisdiction of this case, because it was a case in equity, and could not be tried at law as was done." This objection is based on the claim that the action was in fact brought to establish and enforce a trust. But the district court had jurisdiction of the subject-matter of the action, whether the relief required be legal or equitable. If plaintiff erred in the kind of proceedings he adopted, the proper remedy was a transfer of the action to the proper docket. Code, sec. 2514; *Gould v. Hurto*, 61 Iowa, 47. This appellant did not ask, but raises the question of jurisdiction for the first time in this court. It is now too late to consider it further.

1. APPEAL: question not raised below: kind of proceedings.

II. The objection most seriously urged by appellant, and the one upon which he seems chiefly to rely, is that "the action of the court in this case raised a trust upon an absolute warranty deed, which cannot be done." It is claimed that parol evidence was not competent to establish the alleged fact that the conveyance in controversy was made to defendant as an agent or in trust. This claim may be conceded for the purposes of this case. Code, sec. 1934; *Ratliff v. Ellis*, 2 Iowa, 62; *Kramer v. Kramer*, 68 Iowa, 568; *McGinness v. Barton*, 71 Iowa, 645. But appellant

2. ——: rulings on evidence: no exceptions.

neglected to preserve his right to urge that claim in this court. It is true that the alleged agency was established wholly by parol evidence, admitted against the objection of appellant. But it is not shown that any exception was taken to the rulings of the court in admitting this testimony. We have frequently held that we will not consider objections unless based upon exceptions taken in the court below. *Redding v. Page*, 52 Iowa, 406. Such exceptions must be shown to have been made and preserved in the manner required by law, and will not ordinarily be presumed.

In view of the facts disclosed by the record, this case must be

AFFIRMED.

ACREA V. BRAYTON.

1. **Appeal**: EVIDENCE TO SUPPORT VERDICT. Though the evidence to support a verdict is meager, this court will not set it aside for that reason.

2. **Trespass**: CUTTING AND CONVERTING HAY: DAMAGES: EVIDENCE. One who without any right goes upon another's land and cuts the grass and makes it into hay and converts it to his own use, is guilty of a trespass, which continues up to and includes the final conversion of the hay; and the measure of the owner's damages is the value of the hay when converted, and not of the standing grass. And in such case, where the land lay near the town of L., which was one of the markets of the community for such products, witnesses who testified that they were acquainted with the value of hay at L. were competent to testify to give their opinion as to the value of the hay when converted.

Appeal from Harrison District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, MAY 17, 1888.

ACTION to recover damages for a trespass alleged to have been committed by defendant in carrying away and converting certain hay belonging to plaintiff. Verdict and judgment for plaintiff. Defendant appeals.

S. H. Cochran, for appellant.

H. H. Roadifer and *J. H. Smith*, for appellee.

REED, J.—The land on which the trespass is alleged to have been committed, for many years before the thirtieth of June, 1886, belonged to Henry Reel. On that day he sold and conveyed it to plaintiff. It consists of eighty acres, part of which was in cultivation, and part in grass. It was inclosed, but there were no buildings on it. For about ten years before the year 1886, defendant had cultivated the portion that was in cultivation, and had cut the grass which grew on the remainder, and made it into hay. This was done under a parol agreement with Reel, entered into in about 1876, and as rent of the premises defendant delivered to Reel each year a portion of the grain raised thereon, and a portion of the hay. In March, 1886, Reel rented the arable land to one Poor, who entered thereon, and planted a portion thereof in corn. Defendant thereupon instituted a suit against Poor, in which he asked and obtained an injunction restraining him from occupying or cultivating the land. The injunction was subsequently dissolved, but while it was in force defendant took possession, and cultivated the crop which Poor had planted, and that was the condition of affairs when plaintiff purchased the premises. Afterwards defendant cut the grass growing on the land, and made the same into hay. He offered to deliver to plaintiff one-third of the hay as rent, but he refused to accept it, and brought this action to recover the value of all of it. He does not deny that the hay which defendant offered to deliver was a fair rental for the grass-land, but his claim is that defendant had no right in the premises, and that his act in cutting the grass was a trespass. Defendant's claim was that his occupancy of the premises under the agreement with Reel created a tenancy at will, or, if not that, a tenancy from year to year, and that the same had never been terminated. The district court instructed the jury, in effect, that the tenancy, whether it be regarded

1. APPEAL: evidence to support verdict.

as a tenancy at will, or from year to year, could be terminated by Reel only at the end of the year, and only by serving defendant with written notice of his intention to terminate it, but that it might be terminated by the agreement of the parties. There was no evidence, however, of the service of any written notice, and the court so instructed the jury. The verdict, then, necessarily implies a finding by the jury that there was an agreement to terminate the tenancy. But it was contended that such finding is not supported by the evidence. It must be admitted that the evidence of an agreement by defendant to surrender the possession is meager. Still we think it cannot be said that there was no evidence tending to prove such agreement, and under the well-settled rule we will not disturb the judgment on that ground.

2. TRESPASS: cutting and converting hay: damages: evidence.

On the trial, witnesses who testified that they were acquainted with the value of hay at Logan, the land being situated near that town, were permitted, against defendant's objection, to testify to their opinion as to the value of the hay in question. The objections urged against that ruling were (1) that, as defendant's act in cutting the grass was a trespass, the measure of plaintiff's damages was the value of the grass as it stood upon the ground before the trespass; and (2) that, if defendant is liable for the value of the hay, his liability is measured by the value at the place of conversion, and hence the knowledge of the witnesses of the value of the hay at Logan did not qualify them to express an opinion as to its value at that place. Under the finding of the jury that the tenancy had been terminated, defendant's act in cutting the grass and making it into hay, and subsequently carrying it away and converting it, was a continuing trespass, and he is liable for all of damages caused thereby. He acquired no right to the hay by his act of cutting and curing it, but the ownership remained in plaintiff. His subsequent act of carrying it away and converting it was as much a violation of plaintiff's

rights as any of his acts had been, and it is for that act that plaintiff seeks to recover. By it he was deprived of his property, and he is clearly entitled to recover the value of the property at the time the act was committed. As stated above, the premises are situated near Logan. That town is one of the markets of the community for products of that kind. Very clearly, we think it was competent for the witnesses, who knew its value at that place, to express an opinion as to its value at the place of conversion. Other rulings on the admissibility of evidence are complained of. The questions, however, are neither of controlling importance in the case, nor of general interest, and we deem it unnecessary to consider them, further than to say that the rulings appear to us to be correct. AFFIRMED.

75	722
81	531
75	722
d100	180
75	722
114	273
75	722
115	473

TEACHOUT V. THE DES MOINES BROAD-GAUGE STREET-RAILWAY COMPANY.

1. **Corporations**: RIGHT OF STOCKHOLDER TO ENJOIN ULTRA-VIRES ACTS. A stockholder in a corporation may maintain an action to restrain the corporation from acts in excess of its corporate authority.

2. **Intervention**: NOT PERMITTED TO DELAY CAUSE. When a cause has been submitted to the court upon an agreed statement of facts, it is not error to deny a third party the privilege of intervening, when such intervention would raise new issues, and require a continuance of the main cause for the purpose of hearing testimony.

3. **Cities and Towns**: STREET RAILWAYS: MONOPOLY OF PASSENGER TRAFFIC: ORDINANCE CONSTRUED. An ordinance of the city of Des Moines, granting to the Des Moines Street-Railroad Company the exclusive right for thirty years to use its streets for the construction and operation of street railways, to be operated by animal power only, and providing further that "the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company," does not deprive the said city of the power to confer upon another company, before the expiration of the thirty years, authority to build railways on its streets to be operated by power other than animal power. The diminution of the revenues of the first company on account of the operation of the second one is not such an impairment of its rights and privileges as is contemplated in, and prohibited by, the ordinance. (*Railroad Co. v. Railway Co.*, 73 Iowa, 513, *distinguished*).

Appeal from Polk District Court.—HON. MARCUS KAVANAGH, JR., Judge.

FILED, MAY 17, 1888.

THIS is a proceeding under section 3408 of the Code, by which the parties thereto presented to the court below an agreed statement of facts, and sought the determination of the question whether the Des Moines Broad-Gauge Street-Railway Company has legal power and authority to operate street railroads in the city of Des Moines by electricity or other motive power other than animal power. The issue presented by the agreed statement of facts was in the nature of an action in equity, and the object was to enjoin the Broad-Gauge Street-Railway Company from expending its money and resources in applying the said motive power to propel its cars upon its railroad tracks now constructed, and from constructing other lines of road to be operated by said power. The Des Moines Street-Railroad Company appeared and sought to intervene in the proceeding. The right to intervene was denied, and upon a final hearing there was a decree enjoining the defendant from equipping and operating its lines of street railway, now in the streets of the city, with electric or other motive power other than animal power, and from expending the funds and moneys of said company in the construction of other lines of street railway in said city to be so operated. The defendant appeals from this decree, and the Des Moines Street-Railroad Company appeals from the order denying it the right to intervene in the proceeding.

Read & Read, for H. E. Teachout, appellant.

Parsons & Perry and *Kauffman & Gurnsey*, for the Des Moines Street-Railroad Company, appellant.

Baylies & Baylies, for appellee.

ROTHROCK, J.—I. This proceeding grows out of the litigation which originated between the Des Moines Street-Railroad Company and the Des Moines Broad-Gauge Street-Railway Company, two rival street railways in the city of Des Moines. It is in fact another feature of the contention between said companies which was so elaborately considered by this court in the case of *Des Moines St. R. R. Co. v. Des Moines Broad-Gauge St. Ry. Co.*, 73 Iowa, 513, and other cases. After the filing of the opinion on rehearing in the cases named, the city council, by certain resolutions duly passed, determined that the accommodation of the city, and the welfare of its inhabitants, required that improved motive power, other than animal power, and by which cars can be moved at an average speed of not less than eight miles an hour, should be used upon all broad-gauge street-car lines then in operation in the city, and upon all present and future extensions of said lines; and, by an ordinance passed by the council, authority was given to the Broad-Gauge Company to change its motive power from animal power to electricity, or to such other motive power as may be found practicable to move its cars at the required rate of speed. These acts of the city council were done in pursuance of an application made by said railway company to the council. The plaintiff Teachout is a stockholder in the Broad-Gauge Company, and is surety for it upon some of its indebtedness. He was active in procuring permission from the city council to the company to change its motive power. After the permission and authority were secured he instituted this proceeding, in which he claimed that the corporation in which he was a stockholder could not acquire any valid authority from the city council to operate a street railroad in said city by any propelling power. He was overruled by act of the corporation before this proceeding was commenced. The agreed statement of facts sets forth this matter of difference, and the question presented to the court for its determination was whether the city council had any power or

authority to confer the right upon the company, in view of the decision of this court in the cases above cited. The Des Moines Street-Railroad Company, being what is known as the "Narrow-Gauge Railway Company," appeared, and filed what was denominated a "petition of intervention," in which it was claimed that the proceeding was fictitious, and a fraud upon the rights of the Narrow-Gauge Company, and that it was not a real controversy between the parties, and demanded that it be dismissed. A motion was made by the parties to the proceeding to strike the petition of intervention from the files, for the reason, among others, that the cause had been submitted to the court for its decision, and that there was no right to intervene in the action, and make demands which would delay its determination. This motion was sustained, and the application to intervene was overruled; but, inasmuch as it had been suggested to the court that the controversy was not real and in good faith between the parties, it was ordered that the plaintiff and the officers of the Broad-Gauge Company appear at a time named, and submit to an examination touching the question of good faith and the real nature of the controversy, and that the Des Moines Street-Railroad should be permitted to appear, and examine the said parties touching the controversy, and to introduce other proof on said question material thereto. Thereupon an investigation was had, evidence was introduced, and the cause was submitted to the court, and at the same time, or about that time, another petition of intervention was filed by the Des Moines Street Railroad Company, in which a demand was made that it be allowed to intervene in the merits of the case. On the final submission the following orders were made:

"This cause having been heretofore submitted to the court by and between the parties, upon the written submission and statement of facts filed with the clerk on the fourth day of February, 1888, and the court, being fully advised in the premises, finds that the equities are with the plaintiff, H. E. Teachout. It is therefore ordered and decreed by the court that the defendant,

the Des Moines Broad-Gauge Street-Railway Company, be restrained and enjoined from equipping and operating its lines of street railway, now laid in the city, with electric or other motive power other than animal power, and from expending the funds and moneys of said company in so equipping said line of road, or in constructing, for operation in said city, other lines of street railway, and that the costs of this proceeding be taxed against the defendant. The Des Moines Broad-Gauge Street-Railway Company excepts. And the Des Moines Street-Railroad Company is refused leave to file its petition of intervention, to which the said Des Moines Street-Railroad Company excepts, and has five days in which to file its bill of exceptions.

"MARCUS KAVANAGH, JR., Judge."

"Now upon this eleventh day of February, 1888, this cause coming on to be further heard upon the petition and motion of the Des Moines Street-Railroad Company that the court decline to receive and determine this cause upon the submission and agreed statement of facts by the said Teachout and the said Des Moines Broad-Gauge Street-Railway Company, for the reason that there is no real controversy between said parties, but the same is a fraud upon both the court and the said Des Moines Street-Railroad Company, pursuant to the order of this court made thereupon on the sixth day of February, 1888; and the said Des Moines Street-Railroad Company appearing by its counsel, Galusha Parsons, and the said H. E. Teachout by his counsel, W. L. Read, and the said Des Moines Broad-Gauge Street-Railway Company by its counsel, R. N. Baylies, and the same having been taken under advisement: Now, upon this thirteenth day of February, 1888, it is ordered that the said petition and motion be, and the same are hereby, in all things denied; to which ruling and decision the said petitioner, by its counsel, in open court, duly excepted. And the said Des Moines Street-Railroad Company having presented its petition for leave to intervene to the merits of the said submission, the said petition and motion are denied; to which ruling

and decision the said petitioner, by its counsel, in open court, duly excepted. It is further ordered and adjudged that the said H. E. Teachout recover of and from the said Des Moines Street-Railroad Company his costs of said proceeding, taxed at ———, to which the said Des Moines Street-Railroad Company duly excepted; and it is further ordered that, in the taxation of such costs, the clerk of this court will not tax, as a part thereof, any fees for the said Teachout, or the other officers of the said Des Moines Broad-Gauge Street-Railway Company.

"MARCUS KAVANAGH, Judge."

It will thus be seen that the court was of the opinion that the suggestion that the agreed statement of facts did not present a real issue between the parties, but was a fraud upon the court and upon other parties, was not well founded, and rendered a decree accordingly. We do not deem it necessary to review the evidence upon this question in detail. We are satisfied that the district court was correct in determining that the proceeding ought not to be dismissed as fictitious. It is not claimed that a stockholder in a corporation may not maintain an action to restrain the corporation from acts in excess of its corporate power or authority. It is well settled that such an action will lie. *Sims v. Street Ry. Co.*, 37 Ohio St. 556; Cook, Stocks, secs. 672–674, and authorities there cited. The matter of difference which was submitted to the court was one not of mere expediency as to the prosecution of the business of the corporation. Counsel for the Des Moines Street-Railroad Company strenuously contend that the company they represent have the exclusive right to construct, maintain and operate street railroads in the city; and, if their contention is correct, it would be a most flagrant violation of the corporate powers of the Broad-Gauge Company to waste its substance, and involve its stockholders in a large expenditure of money, without legal authority to move a car upon the streets; and this was the very question which was presented to the court for

1. CORPORATIONS: right of stockholder to enjoin ultra-vires acts.

its determination. And while it may be true that Teachout was active in his endeavors to save the property of the company, and prevent the great loss consequent upon the adjudged exclusive right of the Narrow-Gauge Company, it does not follow that he agreed with the officers and counsel of said company that the decision of this court precluded the company in which he was a stockholder from operating their lines by a motive power other than animal power. The record shows that, so far as his action as a director of the corporation was concerned, he opposed taking any corporate action to apply electric power to the lines of street railroad then owned by the company.

II. Counsel for the Des Moines Street-Railroad Company complain that it was not allowed to intervene in the proceeding. It is very clear that it had no right to intervene to defeat the action or proceeding. Section 2684 of the Code provides: "The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay." And in *Van Gorden v. Ormsby*, 55 Iowa, 657, it is said that "an intervenor cannot be allowed to tender an issue which can be tried only by a change in the form of proceeding, and a continuance of the cause for testimony. If the person intervening has rights which require protection, and which cannot be determined in the main action without delaying the trial, he ought not to intervene, but should commence an original action, and, if need be, and a proper case therefor can be made, protect his interests by injunction." Now, if the intervenor had presented a petition when its first appearance was made, and without setting up facts which must have unavoidably caused delay, and joined the plaintiff Teachout in the demand that the Broad-Gauge Company be enjoined from applying electricity as a motive power upon its road, and upon the ground that the intervenor had the exclusive right to build, maintain and operate street railroads in the city, it may be that the petition for intervention should have been entertained by the court.

2. INTERVENTION: not permitted to delay cause.

But the record does not show that the court held that there was no right of intervention in any event. The refusal to permit the intervention upon the merits may well have been put upon the grounds that it was presented too late, and that it attempted to raise issues which would necessarily involve delay. As will be seen further in this opinion, the only question to be determined arose upon the ordinances and resolutions of the city council. It is true, the agreed statement of facts recited that the Des Moines Street-Railroad Company had failed to furnish efficient street-car service to the public, and this was denied in the petition of intervention. But, in our opinion, this raised an immaterial issue, as will presently be seen; and the Des Moines Street-Railroad Company is in no position to raise that question because the court below, in effect, determined, with a recital of record before it, that the street-car service was inefficient, and with nothing to contradict or call in question the recital that the Narrow-Gauge Company had the exclusive right to maintain and operate street railroads in the streets of the city.

III. We come now to the question of the power or authority of the Broad-Gauge Company to operate its lines by electricity, or other improved or newly-discovered motive power. This question has been elaborately argued by the counsel above named, and by other counsel in behalf of the city and of North Des Moines and of the public generally. It is well to understand the precise point to be determined. As we view it, the power is undoubted, unless the Des Moines Street-Railroad Company has such an exclusive right to construct, maintain and operate street railroads in the city as to exclude all competition of other lines, whatever motive power may be employed by the other lines. In the cases already determined by this court, involving the rights of these rival companies, we determined that the exclusive right to furnish to the city of Des Moines its street-railway service, for thirty years from the time the right accrued, was in the Narrow-Gauge Company.

3. Cities and towns: street railways: monopoly of passenger traffic: ordinance construed.

This statement would seem to include all street railways, as well those operated by animal power as those operated by electricity, or by cables operated by steam or other power; and much of the argument in behalf of the Des Moines Street-Railroad Company is founded upon the claim that this court, in the reasoning in the main opinion, regarded the right to exclusive street-car service without reference to the motive power used. The question then before the court was between two rival companies, both of which operated their lines by animal power. The question of the kind of street-car service was in no manner involved in the case. Those cases were contested, both upon the original submission and upon the rehearing, by able and distinguished counsel. We think it is safe to say that, upon the original argument of the case, the question as to the motive power was not in the mind of court or counsel. At least, it is undoubtedly true that no such question was presented to this court.

In view of the general discussion of the subject in the original opinion, the following language was used in the opinion upon rehearing: "It is proper, however, that we should say, in order to prevent any misconstruction of our opinion, that it was not our intention to hold, and it is not held, that the city is precluded, by the ordinance under which the plaintiff is acting, from availing itself of any improved street railway to be operated by other than animal power, if reasonably necessary to meet the public wants. We did not regard that question as in the case, and on that we express no opinion;" and the decrees in those cases do not require the Broad-Gauge Railway Company to remove their railroad tracks from the streets. They are enjoined from operating their lines of road by cars moved by animal power after the first day of May, 1888. This supplemental opinion and these decrees are a sufficient answer to the argument of counsel based upon the reasoning of the opinion in the cases cited. It was purposely left as an open question; and, as the *personnel* of the court is now nearly the same as then, it is not

improper to say that such was the intention of the court. It is proper to state that the ordinance authorizing the Broad-Gauge Company to use electricity, or other motive power other than animal power, appears to us to be well guarded, so as to protect the rights of the Narrow-Gauge Company in the use of its lines already in operation, or other lines which it may desire to construct in the exercise of its exclusive right to the use of "horse-cars." And it seems to us that we must determine the rights of the parties by the record they have made, or, rather, by the grant of power given to them by the city council. This grant of power is found in the ordinance of the city which was enacted in June, 1866; and that part of it necessary to be considered in determining this case is as follows: "Section 1. Be it ordained by the city council of the city of Des Moines, that consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street-Railroad Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks and switches in, upon and along all the streets, and such alleys only fronting on which said company have depots, stables, or car-houses, and over the bridges and such streets in the city of Des Moines, with their present and future extensions and connections; and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner and for the time and upon the conditions hereinafter mentioned and prescribed. Sec. 2. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway on which other power is used, and no railway car or carriage used upon any other railway in this state shall be used upon any of said tracks. * * * Sec. 10. The right herein granted to said company to operate said railway shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon; and the said city of Des Moines shall not,

until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company."

It seems to us, keeping in mind the fundamental rule that corporations are invested with such powers only as are expressly conferred upon them, and such other powers as are necessary to carry out those expressly granted, that there is little room for discussion or debate as to the powers conferred upon the Narrow-Gauge Company by this ordinance. It has the exclusive right to operate its railways by animal power; and it has no more right to interpose objections to the building and operation of other street railroads, to be operated by other power, than if no grant of power had ever been made to it. The city, it is true, agreed, by section 10 of the ordinance, that it would not "confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company." It is strenuously contended that the granting of the right to operate other street cars will necessarily impair the rights of the Narrow-Gauge Company, by diminishing its revenue, which is derived from the carriage of passengers. Perhaps this argument is sufficiently answered by the thought that, when the city made the contract based upon this ordinance, the parties thereto were dealing with the known, and not with the unknown. It may well be questioned whether the city had any power to contract that no other means of public travel should be allowed upon the streets of the city except by cars drawn by horses for the period of thrty years. If so, the establishment of hack-lines or omnibus-lines, or other means of public conveyance, would impair the revenue of the Narrow-Gauge Company, and thus impair its rights under this ordinance. Its right is to operate a horse railroad. It is entitled to the exclusive right to do so, and to use all improvements that may be made thereto; but to nothing more. The city cannot impair that right; but it does not follow that it may not authorize other means of street travel. It did not

undertake to confer upon the company the right to carry all the passengers who might desire to travel by public conveyance upon the streets; and it did not, by the ordinance, contract that new and improved and undiscovered methods of travel might not be adopted as the public wants might demand. This ordinance and contract were made by the city in behalf of the public, and it should not be so construed as to fetter and prevent the right to use new methods and appliances, the result of the inventive genius of the age, or to apply the discovery and application of the latent powers of nature to the uses of man. As well might the chartered owner of a rope-ferry have insisted, years ago, that his exclusive right to that method of transportation prevented the right to charter a ferry propelled by steam when that element of nature was discovered as a propelling power. As sustaining these views, see *Saginaw Gas-Light Co. v. City of Saginaw*, 28 Fed. Rep. 529; *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 30 Fed. Rep. 324; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116.

We think the decree of the district court should be reversed, and a decree will be entered in this court in accord with this opinion, or the cause will be remanded to the court below for that purpose.

REVERSED.

RUNGE v. HAHN.

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Appeal: TRIAL DE NOVO: CERTIFICATION OF EVIDENCE BY DEPOSITION. A recital in the certificate of the trial judge to the evidence in an equity case, that the cause was submitted upon packages of depositions filed upon certain dates, does not identify such evidence as required by chapter 35, Laws of 1882, repealing and amending section 2742 of the Code. The certificate should, by setting out the name of the witness, or the name of the officer before whom the deposition was taken, and the date when taken, or other explicit recital, identify with certainty the items of evidence referred to. (*Cross v. Burlington & S. W. Ry. Co.*, 58 Iowa, 63, which arose before the enactment of said statute, *distinguished*).

Appeal from Keokuk Circuit Court.

FILED, MAY 23, 1888.

Runge v. Hahn.

THIS is an action in equity for the reformation and enforcement of a written contract for the payment of money. Judgment for plaintiff in accordance with the prayer of the petition. Defendant appeals.

C. G. Johnston and *E. S. Sampson & Son*, for appellant.

Harned & Mohland and *G. D. Woodin*, for appellee.

REED, J.—The cause was submitted at the January term, 1886, of the circuit court, and taken under advisement, and the judgment was entered at the October term in the same year. The circuit judge, at the time of the submission, signed the following certificate: "And now, on this day, to-wit, * * * this cause came on for hearing. * * * The cause is tried and submitted to the court on the following evidence, and none other, to-wit: Plaintiff offers—(1) package of depositions filed June 23, 1885; (2) package of depositions filed December 3, 1885; (3) package of depositions filed January 6, 1886. Plaintiff rests. Whereupon the defendant offered the following evidence, to-wit: Package of depositions filed December 26, 1885. Defendant rests. I, W. R. Lewis, before whom the above-entitled cause was tried, do hereby certify that the above and foregoing schedule correctly specifies and refers to all the evidence offered and all the evidence received on the trial of the cause." At the November term, 1887, of the district court (the circuit court having in the meantime been abolished, and the business pending therein transferred to the district court), an order was entered on defendant's motion correcting the certificate as to the date of filing of the first package of depositions referred to, making the date the twenty-ninth, instead of the twenty-third of June, 1885. Appellee filed a motion in this court to strike out the evidence contained in the abstract, on the ground that it was not properly identified, and that the trial judge had not certified the evidence on which the cause was submitted, as required by

law. He also filed an amended abstract denying that all the evidence is contained in appellant's abstract. We find it unnecessary to inquire whether the district court had any jurisdiction, after the expiration of the time allowed for taking the appeal, to correct the certificate. It is proper to say, however, that the case of *Lewis v. Markel*, 71 Iowa, 652, is not strictly analogous. In that case the judge, after the expiration of six months from the rendition of the judgment, amended the certificate by inserting therein a matter essential to its validity. In effect there was no certificate until the amendment was made, so that that which was done by the amendment amounted to the making of a certificate at that date; and we held that under the statute the judge had no authority to sign a certificate at that time. Here what was done was simply to correct a clerical error in the certificate, and the correction was made by the court whose record was affected by it. But we deem it unnecessary to go further into that question, for in our opinion the certificate as amended is not sufficient. The statute (Code, sec. 2742, as amended by ch. 35, Acts 19th Gen. Assem.) requires the trial judge in equitable actions to certify all the evidence offered and introduced upon the trial. The object of this provision is to secure such identification of the items of evidence offered and introduced upon the trial that no question can fairly arise upon appeal as to what the evidence is. The certificate of the judge, when it properly identifies the evidence, has the effect to make it part of the record. It is not essential, as was contended by counsel for appellee, that it contain an express declaration or order making the evidence part of the record; but that result follows when it identifies the different items of evidence offered and introduced on the trial, and is signed in due time. And it cannot, in the matter of identification, be supplemented by the certificate of the clerk. The office of the certificate of the clerk required by section 3184, since the enactment of chapter 35, Acts Nineteenth General Assembly, is to identify and authenticate the record. Before that enactment, depositions and other papers used merely as

evidence were not deemed part of the record, and could be identified by the clerk's certificate; but its effect clearly is to change that rule. *Cross v. Burlington & S. W. Ry. Co.*, 58 Iowa, 63, arose before its enactment, and it is not now an authority on the question. A recital in the certificate that the cause was submitted upon packages of depositions filed upon certain dates does not identify the evidence, and does not comply with the requirements of the statute. For such recital would apply to any depositions which may have been filed upon those dates, and leaves it to the clerk and the parties to determine what particular depositions were intended. But the confusion and uncertainty which was liable to arise under that practice is the very evil which the legislature intended by the enactment to correct. The certificate then should, by setting out the name of the witness, or the name of the officer before whom the depositions were taken, and the date when taken, or other explicit recital, identify with certainty the items of evidence referred to. We cannot therefore consider the evidence contained in the abstract; and, the questions in the case being alone of fact, there is nothing we can decide, and the judgment must accordingly be

AFFIRMED.

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HARRISON V. CLIFTON.

1. **Forcible Entry and Detainer: FORFEITURE OF LEASE: EVIDENCE.** In an action of forcible entry and detainer against a tenant on the ground that he had forfeited his lease, evidence that the defendant did not properly cultivate the farm and care for the stock leased therewith was properly excluded, since the lease did not provide that for such negligence the lessor might elect to terminate it.

2. ——: ——: **TIME FOR DELIVERING SHARE: CONSTRUCTION.** The lease in question bound the defendant to pay, as rent, one-half of the crops, and one-half of the cream and butter, and provided that, for a failure to pay any of the rent for a period of ten days after due, the plaintiff might declare the lease forfeited and proceed by forcible entry and detainer. In such proceeding, based upon an alleged failure to deliver half the cream, *held* that the lease did not provide when the cream should be due, and that a delivery of a proper amount of cream within a reasonable time during the term was sufficient.

3. **Appeal:** FROM JUSTICE'S COURT: FILING PAPERS IN APPELLATE COURT: WHAT SUFFICIENT. In section 3583 of the Code, requiring a justice of the peace, when an appeal is taken, to file in the office of the clerk of the appellate court all the original papers and a transcript of his docket, the word "file" means deposit, and when the papers and transcript are so deposited by him, the cause is deemed to be in the appellate court, and the neglect of the clerk to make a note of the filing in the appearance docket is immaterial, as section 200 of the Code, making such entry essential to the proper filing of pleadings, is not applicable.

Appeal from Palo Alto District Court—HON. GEORGE H. CARR, JUDGE.

FILED, MAY 25, 1888.

THIS is an action of forcible entry and detainer, brought originally before a justice of the peace. Plaintiff recovered judgment in that court, and defendant appealed. The trial of the cause in the district court resulted in a verdict and judgment for defendant. Plaintiff appeals.

Harrison & Jenswold and *P. O. Cassidy*, for appellant.

C. E. Cahoon, for appellee.

REED, J.—Plaintiff leased a farm and certain cows to the defendant for a term of seven years, commencing April 1, 1886. By the terms of the contract, defendant was to pay as rent one-half of the crops grown on the premises, also one-half of the cream and butter from the milk of the cows. The lease also contains the following provisions: "If any of the rents herein specified shall become due and remain unpaid for the period of ten days, then it shall be optional with Harrison to declare this lease void, and, upon giving ten days' notice thereof, reënter upon said premises, and remove all persons therefrom, without process of law, or to proceed with the remedy of forcible entry and detainer as

provided by statute, and said Clifton to farm said premises in a good and workmanlike manner. * * * Harrison agrees that upon the payment of rents herein specified, and the fulfillment of the covenants herein made, to maintain said Clifton in the lawful possession and use of said premises until the end of said term." In August, 1886, plaintiff caused a written notice to be served on defendant, informing him that he elected to terminate the lease; and, after the expiration of ten days, he instituted this action, alleging in his petition that defendant had neglected to pay the rent as provided in the contract; also that he had neglected to farm the place, or care for the cows, in the manner required by the lease, and that he had neglected to harvest certain grain and timothy grown upon the premises, and that he (plaintiff) had been compelled to expend a large sum of money in harvesting and caring for the same, and that such expenditure was necessary for the preservation of the property.

I. On the trial in the district court the court excluded certain evidence offered by plaintiff to prove that defendant did not feed, care for or shelter the cows, as requiredb y the contract, and that he did not cultivate the leased premises in a good and workmanlike manner. It is doubtless true that the effect of the defendant's neglect in these respects would be to lessen the amount of the rent, and, being injurious to plaintiff, he would have his proper remedy therefor. But the parties did not make that a ground for terminating the lease. Plaintiff was entitled to receive as rent one-half of the crops grown on the premises, and one-half of the cream and butter from the milk of the cows, and it was the failure to pay such rent when the same became due which, by the express provisions of the lease, was made a ground for terminating it. For the neglect alleged, and which the excluded evidence, we may assume, would have proven, his only remedy was in an action for damages. The ruling of the court in excluding it on the trial is clearly right.

1. Forcible entry and detainer: forfeiture of lease: evidence.

II. The evidence without conflict shows that while defendant delivered to plaintiff one-half of the butter manufactured, he did not deliver any cream, but sold all not manufactured into butter, and kept the proceeds until after the notice of plaintiff's election to terminate the lease was served on him, and until after the suit was instituted, when he paid one-half the amount to him. It was insisted that on this state of facts plaintiff's right under the provision of the contract to terminate the agreement is clear. It is to be observed, however, that the lease makes no provision as to the time or times when the cream should be delivered. If defendant should deliver, during any period of the term, and within a reasonable time, an amount of cream equal to that he had previously appropriated, the conditions of the contract would be performed. The court instructed the jury that, as no time of payment was specified in the contract, defendant was required to pay within a reasonable time, and the correctness of the instruction is not questioned; and the jury may well have found under the evidence that he had not had a reasonable time when the attempt to terminate was made, for but a small portion of the term had then elapsed.

2. ——: ——: time for delivering share: construction.

III. Plaintiff filed in the district court a motion to strike the cause from the docket and discontinue it, for the reason that neither the pleadings nor the transcript were filed in the clerk's office. The justice had in fact returned the pleadings, together with the transcript of his docket entries, to the clerk; but the real ground of the motion is that the clerk had neglected to make a note of the filing in the appearance docket. The motion was overruled. Appellant relies on section 200 of the Code, which requires the clerk, immediately on the filing of a pleading, to make a note of such filing in the appearance docket, and provides that no pleading shall be deemed filed until such entry is made; and on *Padden v. Moore*, 58 Iowa, 703, and *Nickson v.*

3. APPEAL: from justice's court: filing papers in appellate court: what sufficient.

Blair, 59 Iowa, 531, in which we held that this requirement is mandatory, and that a pleading could not be regarded as filed until the note of the filing was entered on the appearance docket. We are of the opinion, however, that section 200 does not apply to actions appealed from justices of the peace to the district or circuit court. This is clear, we think, from the provisions of the statute specially applicable to that class of cases. Section 3583 makes it the duty of the justice of the peace, when an appeal is taken, to file in the office of the clerk all the original papers relating to the suit, with a transcript of all the entries in his docket. It is clear that the word "file," as used in that section, means simply to deposit. The entry in the appearance docket is not essential to the filing as there directed, for that is required to be made by the clerk, whereas it is the justice who is required to file the papers. Section 3584 provides that, "upon the return of the justice being filed in the office of the clerk, the cause shall be deemed in the circuit court." The word is used in the same sense in that as in the previous section. The cases cited were brought originally in the district court, and have no bearing on the question. The motion was properly overruled, as was also the motion for a continuance based on the same ground. AFFIRMED.

EATON v. PEAVY.

1. **Husband and Wife:** ACTION FOR DIVORCE: HUSBAND'S LIABILITY FOR WIFE'S ATTORNEY FEES. (*Clyde v. Peavy*, 74 Iowa, 47, *followed*).

2. **Account:** WHAT IS: PROOF OF ON DEFAULT. A claim for attorney fees consisting of different items of charges for services, and small disbursements made in the payment of witnesses, and the like, is an account, and in an action thereon, where the petition was verified and a bill of particulars was attached, and defendant made default, judgment was properly entered without further proof of the claim. (See chap. 36, Laws of 1876).

Appeal from Mitchell District Court.—HON. JOHN B. CLELAND, Judge.

FILED, JUNE 1, 1888

THIS action was brought to recover for services as an attorney in defending appellant's wife in an action for a divorce brought by him against her. A demurrer to the answer was sustained, and a judgment by default for want of answer was entered against the defendant. He appeals.

J. M. Moody and *M. M. Browne*, for appellant.

W. L. Eaton and *J. F. Clyde*, for appellee.

ROTHROCK, J.—This appeal presents substantially the same questions as are involved in the case of *Clyde v. Peavy*, 74 Iowa, 47, and a citation of that case is all that we deem necessary here. There is this difference in the cases: The demurrer in the present case was directed to the whole answer, and it was sustained generally. The defendant was then in default for answer. The petition was duly verified, and the account for services was attached thereto. Complaint is made because the court rendered judgment without proof of the claim.

Under the provisions of section 1, chapter 36, Laws of 1876 (Miller's Code, p. 863), no proof was necessary. The action was upon an open account, and the petition was duly verified, and a bill of particulars of said account was attached to the petition, and there was no answer controverting the account. It is insisted by the defendant that the claim is not an account. We think otherwise. It is as plain an action on an account as the action of a merchant for goods sold. It consists of the different items of charges for services, and small disbursements made in the payments of witnesses and the like.

AFFIRMED.

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THE STATE v. PUGSLEY.

1. **Evidence**: RESIDENCE OF WITNESS: TENDENCY TO DISGRACE AND IMPEACH. It is always allowable to ask a witness where he resides and how long he has resided there; and if he happens to be residing in the county jail awaiting trial upon an indictment for larceny, he will not be excused from answering such questions on the ground that his answers might incidentally tend to disgrace him, affect his credibility or weaken his evidence.

2. **Criminal Law**: INDICTMENT: PLACE OF CRIME: NEAR COUNTY LINE: LOCATION IN WRONG COUNTY. Under section 4160 of the Code, providing that "when a public offense is committed on the boundary line of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county," the defendant was indicted in Ringgold county for stealing a dead body in said county from a certain named cemetery, which the evidence on the trial showed to be situated in the adjoining county of Taylor, but within five hundred yards of the line dividing those counties. *Held* that the failure of the indictment to state accurately the place where the offense was committed was in no respect prejudicial to defendant, and, under section 4306 of the Code, no ground for reversal. [SEEVERS, C. J., *not concurring*].

3. ———: JURISDICTION OF OFFENSES NEAR COUNTY LINE: CODE, SECTION 4160: CONSTITUTIONALITY. Section 4160 of the Code, providing that "when a public offense is committed on the boundary line of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county," is not invalid under that provision of the constitution which provides that "the right of trial by jury shall remain inviolate;" said section having been the law of the state from a date prior to the adoption of the first constitution.

4. **Evidence**: LEADING QUESTIONS: DISCRETION OF COURT: APPEAL: OBJECTION NOT MADE BELOW. The state asked one of its witnesses a leading question, to which defendant objected, but the court, in some remarks made in the presence of the jury, overruled the objection. No objection was then made to these remarks. *Held* that none could be heard in this court; also, that it was within the sound legal discretion of the trial court to allow leading questions, and that this court could not interfere where no abuse of such discretion is shown.

5. **Criminal Evidence**: MOTIVE FOR CRIME. It is always competent to prove facts constituting a motive on the part of defendant for committing the alleged crime. And so, in a prosecution for body-stealing, where the theory of the state was that the crime was a part of a plan for procuring insurance upon the life of a person who was not in fact dead, and there was evidence tending to establish such theory, the policies of insurance were properly admitted.

6. **Criminal Law**: NOTICE TO DEFENDANT AS TO WITNESSES: SERVICE: RETURN: VERIFICATION. A notice was served by the sheriff upon the defendant that the state would introduce a witness not named on the indictment. The sheriff's return, presumed to be written on the notice, stated that he served the "within notice" on the defendant by reading to him, and by delivering to him personally, a copy thereof. *Held* that the return was not objectionable as showing that a copy, and not the original notice, was read to him; nor on the ground that the return was not verified,—such verification being unnecessary when service is made by the sheriff.

7. **Body-stealing**: EVIDENCE OF UNLAWFUL DISINTERMENT. The court did not err in submitting to the jury a prosecution for body-stealing, on the ground that there was no evidence to show that the body was disinterred without lawful authority, where the evidence tended to show that the disinterment was made secretly, during the night-time, and that the body was concealed for several days, and that an attempt was then made to burn it.

8. **Instructions**: NOT WARRANTED BY EVIDENCE: ERROR CURED. An instruction in this case directing the jury to find defendant guilty if they found from the evidence that he aided and abetted others in the commission of the crime charged, was erroneous, because there was no evidence that he so aided and abetted, but *held* that such error might be cured by other instructions given in the case, and that the error in this case was so cured. [SEEVERS, C. J., and REED, J., *dissenting*, both as to the rule and the application of it].

9. **Criminal Law**: INDICTMENT AS PRINCIPAL: EVIDENCE OF AIDING AND ABETTING. An indictment charging the defendant as principal may be supported by evidence showing him to have been an accessory, since accessories are principals, under Code, section 4314.

10. **Appeal**: EVIDENCE: RULINGS NOT PREJUDICIAL. Rulings admitting and excluding evidence which could not affect the verdict either way are not prejudicial, even if erroneous, and are no ground for reversal.

11. **Instructions**: REPETITION NOT REQUIRED. It is not error to refuse an instruction asked when the same doctrine, in substance, is announced in the charge of the court.

Appeal from Decatur District Court.—HON. JOHN W. HARVEY, Judge.

FILED, JUNE 4, 1888.

INDICTMENT charging that the defendant, in the county of Ringgold, did unlawfully enter a certain cemetery, commonly called the Mormontown Cemetery, and therein did disinter and remove, without lawful authority, the dead body of Arthur Lynch. There was a trial to a jury, verdict of guilty, and judgment. The defendant appeals.

J. L. Brown, *Laughlin & Campbell* and *E. W. Curry*, for appellants.

A. J. Baker, Attorney General, for the State.

SEEVERS, C. J.—I. The defendant took the deposition of one Stevens, and the state, on cross-examination, asked the witness certain questions, which, and the answers thereto, are as follows: "Where are you now living? A. Bedford. What are you doing there? A. Waiting for court to come. Where are you stopping at this time? A. I am in the jail of Taylor county. How long have you been in jail? A. Since the last part of February." To the last two questions defendant objected when the deposition was taken, and filed a motion to strike the same out of the deposition. This motion was overruled, and the foregoing questions and answers were read to the jury. It was conceded, when the deposition was taken, that the witness had been indicted for larceny, and was confined in jail on such charge; but there was no evidence tending to show that he had been convicted or even tried. Counsel for the defendant insist that the object and purpose of the questions asked, and the evidence elicited in response thereto, was to disgrace the witness, cast suspicion on and weaken his evidence in chief, and that the mere fact

1. EVIDENCE: residence of witness: tendency to disgrace and impeach.

that a person has been indicted and is confined in jail has no tendency to impair his credibility as a witness, or to impeach his moral character. In support of these views, *People v. Elster*, 3 Pac. Rep. 884; *Same v. Hamblin*, 68 Cal. 101; s. c. 8 Pac. Rep. 687; *Kitteringham v. Dance*, 58 Iowa, 632; *Slocum v. Knosby*, 70 Iowa, 75,— are cited. The last two cases, clearly, are inapplicable, and in the former the witness, in substance, was asked whether he had ever been arrested for a felony, and he was compelled to answer the question asked. This was held to be erroneous because the evidence had no tendency to impeach the credibility of the witness. The case at bar is essentially different. It is competent to ask a witness what is his occupation, and where he resides; and such is the settled practice in this state. Therefore it follows that if, in answer to competent questions so framed as to elicit the information just stated, the facts disclosed have a tendency to disgrace the witness, affect his credibility, or weaken his evidence, no just complaint can be made that such effect is produced, for the reason that it is an incidental consequence which follows or results from the introduction of competent evidence.

II. The evidence clearly shows that Mormontown cemetery is situate in Taylor county, but within five hundred yards of the line between it and Ringgold county. It will be observed that the indictment charges that the criminal act was committed in the last-named county; and it is provided by statute, "when a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county." Code, sec. 4160. Counsel for the defendant contend that the offense charged is of a local and not of a transitory character; that it is like burglary, which of necessity must be committed by breaking into a building, which must be described as being situate in some county; and so here the cemetery from which the disinterment is made must be properly described as being situate in a county; and the offense

2. Criminal law: indictment: place of crime: near county line: location in wrong county.

must be proved as stated in the indictment; that the fact that the cemetery is within five hundred yards of the county line is immaterial, unless the indictment so charges. In other words, the defendant claims that he cannot be tried in Ringgold county for an offense committed in Taylor county, unless it is charged in the indictment that the offense was committed in the last-named county, and within five hundred yards of the boundary line between it and Ringgold county. In support of this proposition, the following authorities are cited: *People v. Slater*, 5 Hill [N. Y.] 401; *Haskins v. People*, 16 N. Y. 344; *People v. Scott*, 74 Cal.—; s. c. 15 Pac. Rep. 384; *Miles v. State*, 23 Tex. App. 410; s. c. 5 S. W. Rep. 250; *Chevarrio v. State*, 15 Tex. App. 330. The contention of the attorney general is that the statute in express terms gives the court in either county jurisdiction of the offense, and therefore it may be well charged to have been committed in one county, and the defendant convicted when the evidence shows it was committed in the other, but within five hundred yards of the boundary line. He cites and relies on *State v. Robinson*, 14 Minn. 451, [Gil. 333]. The indictment in that case was found in and by a grand jury of the county of Carver, and it charged that the offense was cemmitted "in the county of Scott, in the state of Minnesota, within one hundred rods of the dividing line between said county of Scott" and the county of Carver. There is a statute in Minnesota which provides that "offenses committed on the boundary lines of two counties, or within one hundred rods of the dividing line between them, may be alleged in the indictment to have been committed in either of them, and may be prosecuted and punished in either county." The indictment was held to be sufficient, and there is no doubt that the holding is correct. As we understand, however, the court went further, and held that the indictment would have been sufficient if it had simply alleged that the offense had been committed in the county of Carver. This last holding is, however, clearly *dictum*. There was no such question before the court.

It is provided by statute that no indictment shall be deemed insufficient, nor can the trial, judgment or other proceedings, be affected by "any matter which was formerly deemed a defect or imperfection, but which does not tend to prejudice the substantial rights of the defendant on the merits." Code, sec. 4306. A majority of the court are of the opinion that, under this statute, the failure of the pleader to state accurately the place where the offense was committed was in no respect prejudicial; the thought being that the only reasons for so stating the place are—(1) that the defendant may be informed with sufficient certainty of the particular offense charged; and while it may be considered that, ordinarily, the place where a local offense is committed is an important factor in the description of the offense, yet as in this case the cemetery, or place where it was committed, is stated, the thought is that the substantial rights of the defendant were not prejudiced by locating it in the wrong county; (2) although the place is wrongly stated, the defendant could readily, had he been acquitted and again indicted, show by parol that the two offenses were in fact the same. In these views the writer hereof is unable to concur, for the reasons that in such case the defendant might be indicted in Taylor county, and in such case the indictment would accurately describe the offense as having been committed in that county. Upon introducing parol evidence to establish the identity of the two offenses, he would be met with the objection that the indictments charged the offenses in two different counties. It must be conceded, I think, that there are doubts whether, in such case, parol evidence would be admissible to contradict the indictment. But, conceding that it would be, it has always been held that the fact that the county or district in which the crime was committed was within the jurisdiction of the court should be accurately stated, and that the proof must sustain such allegation. *Queen v. Mitchell*, 2 Adol. & E. [N. S.] 636. When the place, county or district is correctly stated in the indictment, the defendant is not driven to the necessity of introducing

oral evidence, which he may or may not be able to obtain; but his plea of a former acquittal, ordinarily, is sustained by the introduction in evidence of the record in the former case. He therefore, in such case, it seems to me, is prejudiced by the failure of the indictment to state that the offense was committed in Taylor county within five hundred yards of the boundary line between it and Ringgold county. The name given to the cemetery makes no difference, unless it intensifies the error of the court, because it is described as being in Ringgold county, and there is nothing in the record which tends to show that there is not such a cemetery in that county.

III. It is urged with much force and vigor that section 4160 of the Code is unconstitutional, for the reason that the constitution must be construed as if it expressly provided that an indictment can only be found by a grand jury of the county where the offense is committed, and that the trial jury shall come from such county. The first constitution of this state was adopted in 1846, and it contained the following provision: "The right of trial by jury shall remain inviolate, but the general assembly may authorize trial by jury of a less number than twelve men in inferior courts." This constitution was superseded by the one now in force, which was adopted in 1857, and it contains, in substance, the same provision. A statute precisely the same as section 4160 of the Code was in force when the first constitution was adopted (Revision [Blue Book] 1843, p. 153, sec. 40), and such a statute has been in force at all times since 1843. This being so, the right of trial by jury is the same now as it was when the first constitution was adopted, and therefore the statute in question is not unconstitutional, for the reason that constitutional rights of the defendant have not been in any respect impaired. The authorities cited by counsel are not applicable.

8. ——: jurisdiction of offenses near county lines: Code, section 4160: constitutionality.

IV. A witness for the state was asked a leading question, to which counsel for the defendant objected

4. Evidence: leading questions: discretion of court: appeal: objection not made below.

for that reason, whereupon the court said, in the presence of the jury: "I don't know why this witness has been answering as he has. He is not answering as prompt as he might. Any person can see that. I will let the state lead him. I have no doubt about a part of that being correct, though." This language of the court is criticised by counsel, and he contends that the defendant was prejudiced thereby. The language used by the court is, we think, somewhat objectionable; but whether it was prejudicial may be doubtful, and we are not called on to determine such question. It will be observed that no objection was made to the remarks made by the court, and that the only objection made was that the question was leading. It was clearly within the sound legal discretion of the court to permit the counsel for the state to ask the witness leading questions, and our examination of the record satisfies us that such discretion was not abused.

V. The theory of the state was, and there was evidence tending to prove, that one Quigley had procured insurance on his life, and that the body was disinterred, and an attempt made to burn it. Quigley was to disappear, and the claim made that he was dead, so as to procure the insurance. The insurance policies were introduced in evidence, against the objection of the defendant; and in this respect it is insisted that the court erred. But we think otherwise. It is always competent to prove a motive for the commission of any crime, and therefore the policies of insurance were properly admitted in evidence.

5. Criminal evidence: motive for crime.

VI. One Quigley was introduced as a witness by the state. His name is not indorsed on the indictment. The state claims that a notice was served on the defendant that Quigley would be introduced as a witness. The proof of service of such notice is as follows: "State of Iowa, Ringgold county: I hereby certify that I personally served the within notice on the within-named

6. Criminal law: notice to defendant as to witnesses: service: return: verification.

defendants, A. E. King and C. S. Pugsley, by reading to them, and by delivering to each of them personally, a copy of the same, in Ringgold county, Iowa, on the 1st day of June, 1885. James Beard, sheriff." It is objected that such proof of service is insufficient, because (1) it does not appear that the original notice was read to the defendant, but that it affirmatively appears that a copy thereof was read to and delivered to him. The proof of service is that the within notice was read, and a copy thereof delivered to the defendant. This, we think, is the proper construction of the return; for, in the absence of any showing to the contrary, it will be presumed it was written on the original notice. (2) It is said it should have been verified, and that the return of the sheriff is not sufficient. But we think otherwise. The sheriff is an officer of the court, whose duty it is to serve such notices, and his return proves itself.

VII. It is contended by counsel for the defendant that the court erred in submitting the case to the jury, and in refusing to grant a new trial, for the reason that there was no evidence tending to show that the body was disinterred without lawful authority. But we think the court did not err in this respect. There was evidence tending to show that the disinterment was during the night-time, and secretly made. The body was concealed for several days, and then an attempt made to burn it. Besides this, there was evidence tending to show that it was disinterred for an unlawful purpose. We have a clear conviction that the court rightly submitted the case to the jury, and that in the respect mentioned the verdict is sustained by the evidence.

7. BODY-STEALING: evidence of unlawful disinterment.

VIII. The court instructed the jury that, before they could find the defendant guilty, they must find that he "unlawfully dug open the grave mentioned in the indictment, and removed therefrom, without lawful authority, the remains of Arthur Lynch, as alleged in the indictment, or that he aided, assisted or advised, or was in some way connected with, the digging up and

8. INSTRUCTIONS: not warranted by evidence: error cured.

removing said remains." In another paragraph of the charge the court said: "And in this case, if you find and believe from the evidence that the body of the said Arthur Lynch was interred in the cemetery at Mormontown, and that the place of interment of said body was within five hundred yards of the Ringgold county line," and that such body "was, without lawful authority, wilfully or intentionally dug up * * * in the manner as alleged in the indictment, and that defendant aided, assisted, encouraged, enticed or in any manner procured, the same to be done, then you should find him guilty." It is objected that the first instruction is erroneous, because there is no evidence tending to show that the defendant dug up or aided or assisted in any way in removing the body from the grave; and we are unable to discover any such evidence in the record, but there is evidence tending to show that the defendant is an accessory, and advised and abetted others in the commission of the crime. A majority of the court, however, think that, in view of the second instruction and the entire record, the jury could not have been misled by the first instruction, and therefore the defendant was in no respect prejudiced thereby. The writer and Mr. Justice REED think otherwise, and are unable to see that the second instruction qualifies the first in any material degree, for the fact remains that, under the first instruction, the question whether the defendant dug up the body, or aided in digging it up, was submitted to the jury; and, if the second qualifies this thought, it must, of course, be contradictory to the first instruction, and the rule is well settled that it is prejudicial error to give contradictory instructions if one of them is erroneous, for the reason that it is impossible to tell which the jury followed. The minority of the court think that the two instructions are in perfect accord, and mean precisely the same thing. It is well settled that prejudice is presumed to follow error, and the minority are unable to comprehend how it can be fairly said that no prejudice resulted from the erroneous

instruction. There are many cases in which it has been held that an instruction which there is no evidence to sustain is erroneous; and the minority are unable to recall a single case in which it has been held not to be prejudicial. The case most nearly like this is *State v. Myer*, 69 Iowa, 148, in which an instruction that, if the defendant aided and abetted in the larceny, he was guilty of the crime charged, was held to be erroneous. The converse of this holding must be equally erroneous. It is true that in the cited case it is, perhaps, evident that the jury considered the question whether defendant aided in the commission of the crime. But this can make no difference, for the reason that the presumption must in all cases be indulged, and the rule has been applied in many cases, that the jury must and do consider all questions submitted to them by the court, and follow the instructions. This court has in many cases held that the instructions, whether right or wrong, constitute the law of the case, and that it is the duty of the jury to follow them. Therefore it is that the conclusive presumption prevails that the jury did so. The court, however, is united in the opinion that the defendant, under the statute, was properly charged or described as principal in the indictment, and that evidence was admissible tending to show that he simply aided and abetted in the commission of the crime. Code, sec. 4314; *State v. Hessian*, 58 Iowa, 68.

9. CRIMINAL law: indictment as principal: evidence of aiding and abetting.

IX. Certain evidence introduced by the state was objected to by defendant, and the objection overruled, and evidence offered by defendant was objected to by the state, and the objection sustained. These rulings are complained of. We have carefully examined the record, and, in our opinion, the errors claimed to exist have no foundation. The evidence introduced and that rejected was not of a controlling character, and had it been introduced or rejected the result would not have been affected. As to this we have no doubt, and therefore the rulings were not prejudicial.

10. APPEAL: evidence: rulings not prejudicial.

X. It is said the court erred in refusing the first instruction asked by the defendant, but we think the fourteenth paragraph of the charge embraces substantially the same legal thought, and therefore the court did not err in the respect mentioned. Several of the paragraphs of the charges are said to be erroneous, but we have carefully examined them all, and feel well satisfied that they are not well founded. The judgment of the district court is

11. INSTRUCTIONS: repetition not required.

AFFIRMED.

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THE STATE v. BOYNTON *et al.*

1. **Assault and Battery**: INFORMATION: REQUISITES. An information for an assault and battery which charged that the defendant "did then and there violently beat, bruise, wound and ill-treat" the complainant, contrary to the statute, etc., is sufficient, without charging that the acts complained of were done in an angry and wilful manner, and with a purpose to inflict bodily injury.
2. **Chattel Mortgage**: DISPUTE AS TO VALIDITY: SEIZING PROPERTY UNDER: PERSONAL VIOLENCE: CONSTABLE. One who is about to take possession of chattels under and by virtue of a mortgage in his possession, and is resisted by the mortgagor on the ground that the mortgage is invalid, must desist from his purpose when he finds that it can be accomplished only by the use of such force as would cause a breach of the peace; and if he proceeds and commits such acts as, under other circumstances, would amount to an assault and battery, he will be guilty of that offense. And the fact that he is a constable makes no difference; for in such a transaction he does not act in his official capacity, but only as the mortgagee's agent.
3. **Appeal**: CRIMINAL CASE: EVIDENCE TO SUSTAIN FINDING OF COURT. The finding of the district court, upon the trial without a jury of an assault and battery case on appeal from a justice, has the effect of the verdict of a jury, and will not be disturbed in this court for want of evidence to support it, when the evidence is conflicting.
4. **Criminal Law**: JUDGMENT FOR FINE AND COSTS: IMPRISONMENT IN DEFAULT OF PAYMENT: INTERPRETATION. A judgment that the defendants each pay a fine of fifty dollars, and $62.75 costs, and that in default thereof they each stand committed to the county jail for fifteen days, is not illegal as being a judgment for imprisonment for costs; but the imprisonment clause will be held to relate only to the fine, since as to that it is not in excess of the statute. (Code, sec. 4509).

The State v. Boynton.

5. **Assault and Battery**: IN TAKING MORTGAGED PROPERTY: MISTAKE OF LAW: MITIGATION OF FINE. Persons who commit an assault and battery in attempting forcibly to take possession of mortgaged chattels as agents of the mortgagee, after they have been informed of the mortgagor's claim that the mortgage is invalid, cannot have their sentence, otherwise not excessive, mitigated, on the ground that they acted honestly, but under mistake; for their mistake is one of law only, which the law does not excuse.

Appeal from Audubon District Court.—HON. H. E. DEEMER, Judge.

FILED, JUNE 5, 1888.

THE defendants, F. L. Boynton, an attorney, and James McClure, a constable of Crawford county, were employed by Payne Bros., of West Side, to take and remove certain personal property then in the possession of one John Concanan, at his place of residence, in Audubon county. Payne Bros. claimed a right to the property by virtue of certain chattel mortgages and a bill of sale. This right was denied by Concanan, who insisted that these instruments were given to hinder and delay his creditors, that nothing was due thereon and that they were invalid. Defendants went to Concanan's residence, and proceeded to take the property. Concanan refused to allow the property to be removed, and attempted to prevent it by seizing and refusing to deliver a team which defendants, with four assistants, were attempting to take. After some struggling, defendants and their assistants attempted to handcuff Concanan, and, after several hours of continuous effort, succeeded in accomplishing that object. It seems probable, from the length of the struggle, that defendants desired to effect their purpose without inflicting unnecessary injury; but it appears that, before Concanan was handcuffed, one of his fingers was broken, a thumb was dislocated and he was otherwise injured. For their connection with this affair defendants were arrested, and tried in justice's court for the crime of assault and battery, and convicted. They appealed, were tried by

the district court without a jury, and again convicted, and now appeal to this court.

Nash, Phelps & Green and *F. L. Boynton*, for appellants.

A. J. Baker, Attorney General, for the State.

ROBINSON, J.—I. Appellants object to the sufficiency of the information under which they were convicted, on the ground that it does not charge that the acts of which complaint is made were done in an "angry and wilful manner," and "with a purpose to hurt or inflict corporal injury." The third subdivision of section 4662 of the Code requires, in an information of the kind in question, "a statement of the acts constituting the offense in ordinary and concise language." The information charges that defendants "did then and there violently beat, bruise, wound and ill-treat the said John Concanan, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Iowa." We think it sufficiently complies with the requirements of the statute.

1. ASSAULT and battery: information: requisites.

II. Each of the chattel mortgages under which defendants claim to have acted contains a provision which is substantially as follows: "And I, the said John Concanan, do hereby covenant and agree to and with the said Payne Bros. that, in case of default made in the payment of the above-mentioned promissory note, or in case of my attempting to dispose of or remove from said county of Crawford the aforesaid goods and chattels, or any part thereof, or whenever the said mortgagee shall choose so to do, then and in that case it shall be lawful for the said mortgagee, or his assigns, by himself or agent, to take immediate possession of the said goods and chattels wherever found, the possession of these presents being his sufficient authority therefor, and to sell the same," etc. It is claimed by appellants that this provision is, in effect, an irrevocable license, which authorized them,

2. CHATTEL mortgage: dispute as to validity: seizing property under: personal violence: constable.

as agents of the mortgagees, to enter the premises of the mortgagor, and take therefrom all mortgaged property; and that, having no power to revoke this right, Concanan had no ground for resisting it. We need not discuss the effect of the provision quoted, nor the rights thereby created, if the instruments were valid and unquestioned. It is sufficient to say that Concanan claimed that they were invalid and of no force; that he was in peaceable possession of the property; and that defendants were fully advised as to his claims in regard to it. If for any reason the instruments were illegal when executed, or, if being legal at that time, they had been discharged, they were of no force, and conferred no right to the possession of the property upon which they were given at the time in question. In that case the attempt of defendants to take and remove the property was as unauthorized as though they were proceeding without color of right, and it was lawful for Concanan to resist the removal. Under the circumstances, it was the duty of defendants to desist from their purpose when they found that it could be accomplished only by the use of such force as would cause a breach of the peace. It was not the case of an officer serving legal process. The fact that McClure was a constable did not affect the rights of defendants. He was not acting by virtue of his office, but only as the agent of a private citizen. It was the case of one party to a writing claiming a right thereunder,—which was denied by the party of the other part,—and attempting to enforce it by a resort to violence. It is scarcely necessary to say that private disputes cannot be lawfully settled in that manner. The courts were open, and their process available, to establish and enforce any rights to which defendants or their principals were entitled.

III. It is claimed by appellants that Concanan commenced the matter in controversy by first committing an assault and battery upon McClure; that in consequence Concanan became subject to arrest by section 4201 of the Code, which provides that "a private

8. APPEAL: criminal case: evidence to sustain finding of court.

person may make an arrest (1) for a public offense committed or attempted in his presence;" and that whatever was done by defendants was for the purpose of arresting Concanan for the public offense which he had committed in their presence. But some of the evidence tends to show that McClure, abetted by Boynton, was the aggressor, and the finding of the district court as to that fact must stand as the verdict of a jury, and cannot be disturbed by us. Moreover, we think the finding was sustained by the evidence.

IV. It is contended that the judgment of the district court is illegal, in that it provides for imprisonment in case default is made in the payment of costs. The part of the judgment material to this inquiry is as follows: "It is adjudged by the court that the defendants each pay a fine of fifty dollars, * * * and the further sum of $62.75, the costs of this action, and that, in default of the payment of the same, they each stand committed to the jail of this county fifteen days, unless the same are sooner paid." The form of the entry is certainly not to be commended, but, in view of the statute, its effect cannot be doubtful. Section 4509 of the Code provides that "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine." The imprisonment specified in the judgment does not exceed the statutory limit, and, since it is not authorized for costs in cases of this kind, it must be held to apply only to the fines imposed.

4. CRIMINAL law: judgment for fine and costs: imprisonment in default of payment: interpretation.

V. It is urged that the punishment inflicted is excessive, on the ground that defendants were acting in good faith, and under a mistake as to their legal rights. But the alleged mistake was one of law. The claims of Concanan as to the mortgages and bill of sale were known to defendants before they visited his premises.

5. ASSAULT and battery: in taking mortgaged property: mistake of law: mitigation of fine.

We do not think that under the facts of this case the punishment is excessive.

We discover no material error in the proceedings, and the judgment of the district court is therefore

AFFIRMED.

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TURNEY v. BARR.

1. **Judgment**: OF IMPRISONMENT: ATTACK BY HABEAS CORPUS. An attack by *habeas corpus* upon the validity of a judgment of imprisonment is of a collateral character, and, unless the judgment is void, no relief can be obtained in such inquiry. (See opinion for citations).

2. ——: ——: GROSS IRREGULARITIES NOT AVOIDING: REMEDY: HABEAS CORPUS. The defendant in a criminal case was indicted for grand larceny. He was arraigned, and personally pleaded not guilty, and a jury was impaneled and sworn to try and determine the issue thus raised. But he was in the custody of the sheriff, and was not present when the jury was impaneled and sworn, nor during the trial, nor when the judgment of imprisonment was rendered against him upon a verdict of guilty. Moreover, the verdict was not the result of the deliberation of the jury, but was prepared by the court and signed by one of the jurors as foreman under the direction of the court, and no opportunity was given to the jurors to assent thereto or dissent therefrom; and no evidence was introduced, except the minutes of the evidence before the grand jury, which were reduced to writing by the clerk, and returned with the indictment. *Held* that these were gross irregularities, but that the court had jurisdiction of the defendant and of the subject-matter, and therefore the judgment was not void; and that the remedy was by motion for a new trial in the district court, and, if not granted, by appeal, and that the errors could not be reviewed and relief granted upon *habeas corpus* proceedings against the warden of the penitentiary who had him in custody under the judgment. [REED, J., *dissenting.*]

3. **Verdict**: IN CRIMINAL CASE: DIRECTION BY COURT: NON-CONCURRENCE OF JURORS: EVIDENCE. Where the court directed a verdict of guilty in a criminal case, *held* that the fact that the jury did not determine or consider as to the guilt of the defendant could not be established in a collateral proceeding, for the reason that it inheres in the verdict, and the only evidence thereof attainable is that of a juror, which is not competent to prove such fact. [REED, J., *dissenting.*]

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, JUNE 9, 1888.

Habeas corpus. The plaintiff was remanded to the custody of the defendant, and he appeals.

C. C. Cole and *A. H. Denman*, for appellant.

A. J. Baker, Attorney General, for appellee.

SEEVERS, C. J.—The petition states that the defendant is warden of the penitentiary at Anamosa, and, as such, has custody of the plaintiff, who is restrained of his liberty, and that the cause and pretense of such restraint is certain judgments, rendered by the district court of Jackson county in certain criminal actions wherein the state of Iowa was plaintiff and the appellant was defendant, copies of which said judgments are made a part of the petition. The following is a copy of the proceedings of the court, and of one of said judgments, as the same appears of record:

"State of Iowa, Jackson County: Be it remembered that heretofore, to-wit, at a term of the district court of the state of Iowa begun and held * * * in and for said county, * * * present, the Hon. Walter I. Hayes, sole presiding district judge of the Seventh judicial district, * * * the following entitled cause coming on to be heard, * * * the following, among other, proceedings were had therein, to-wit: State of Iowa *v.* Chester Turney. (Larceny.) Now, on this tenth day of December, A. D. 1885, this cause came on for trial, the plaintiff appearing by M. V. Gannon, district attorney, and, the defendant being without means with which to employ counsel, the court appointed A. D. Wynkoop, Esq., attorney to defend him. The defendant being arraigned, says he is indicted by his right name, and pleads not guilty; and thereupon came a jury of twelve men, who were duly sworn to well and truly try said cause, and a true verdict render therein; and the said jury, having heard the evidence, and received the charge of the court, returned their verdict in words and

figures following, to-wit: 'We, the jury, find the defendant guilty, and find the property stolen to be of the value of forty-five dollars. R. C. Westbrook, Foreman.' And on the same day, to-wit, December 10, 1885, the court sustained the verdict, and sentenced the defendant (he waiving time) to imprisonment in the penitentiary at Anamosa, at hard labor, for the term of six months. It is therefore ordered by the court that the defendant, Chester Turney, be taken by the sheriff, and conveyed to the penitentiary at Anamosa, Iowa, and confined at hard labor for the term of six months, and that D. A. Wynkoop be allowed ten dollars for defending, and that judgment be entered against defendant for costs."

The other judgments were substantially the same as the foregoing. The petition further states that the plaintiff is illegally restrained of his liberty on the following grounds: "(1) He was restrained of his liberty by the sheriff of said county, and was not present before said court when the jury was impaneled or sworn in any of said actions. (2) He was restrained of his liberty by said sheriff, and was not present in or before said court during any portion of the trial of each and all of said actions. (3) He was restrained of his liberty by said sheriff, and was not allowed to be and was not present in or before said court when the judgment of the court aforesaid was rendered in any of said actions. (4) The jury in each of said causes did not deliberate upon nor determine the question of this petitioner's guilt or innocence, but, in obedience to the direction of said court, with the district attorney, one of their number, to-wit, R. C. Westbrook, as foreman, did sign and return to said court a written verdict, prepared and handed to him for that purpose by an officer of the court, which verdicts, so signed and returned, were the only verdicts rendered in said actions; and said jury did not, from the time of being sworn and taking their seats in the jury-box in the first of the aforesaid actions, leave the same, nor any member thereof, nor was said jury, nor any member thereof first impaneled as aforesaid, discharged from the jury-box by the court until after

the verdicts had been signed by said R. C. Westbrook, in manner aforesaid, in each of the twelve different actions above mentioned; nor was said jury, nor any member thereof, in any of said causes aforesaid, allowed to express or take any part whatever in determining the question of the guilt or innocence of the defendant in said actions, except the said R. C. Westbrook in the manner aforesaid. (5) There was in fact no trial by either court or jury of the question of the guilt or innocence of the defendant in any of said actions, inasmuch as there was no testimony or evidence offered or introduced, either on the part of the state or said defendant, in any of said actions, nor any pretense thereof, except reading of the minutes of evidence taken by the clerk of the grand jury, and returned with the several indictments."

In the return to the writ the defendant admitted that he held the plaintiff under the several judgments referred to in the petition, but did not controvert in any respect the allegations in the petition. There was a stipulation of the parties that the evidence might be taken in the form of affidavits, and the plaintiff obtained the affidavits of certain persons who had acted as jurors. The defendant filed a motion to strike the same from the record on several grounds, and the motion was sustained, but the affidavits are set out at length in the record before us. The defendant also demurred to the fourth and fifth paragraphs of the petition upon several stated grounds. The demurrer was sustained. The foregoing is a full statement of the record and rulings of the court, except that the contents of the affidavits have not been stated.

I. This case has been elaborately argued by counsel, and many authorities cited, but the legal questions involved are few, and can and must be solved by reference to well settled legal principles, as to the existence of which there cannot, we think, be any serious doubt. For instance, we regard it as undoubted that an attack, by *habeas corpus*, upon the validity of a judgment, is

1. JUDGMENT: of imprisonment: attack by habeas corpus.

of a collateral character, and that, unless the judgment is void, no relief can be obtained in such inquiry. The beginning and end of the inquiry, therefore, is whether the district court of Jackson county had jurisdiction and the power, under the recognized rules of law, to render the judgments it did. Hurd, Hab. Corp. 332; Cooley, Const. Lim. secs. 347, 348; *Ex parte Holman*, 28 Iowa, 88; *Zelle v. McHenry*, 51 Iowa, 572.

Therefore the first three grounds upon which the plaintiff must of necessity claim the judgments are void are, that he was not present when the jury was impaneled or sworn, that he was not present during the trials, and that he was not present when judgment was rendered. Conceding that defendant had the right to be present at such times, and that it is so provided by statute, yet we feel constrained to say that his presence or absence did not affect the jurisdiction of the court, which was conferred by the indictment, the defendant's arrest thereunder, and his being at the time in the custody of the court. It will be observed that the record recites that he was arraigned, and personally pleaded not guilty; and that the record in this respect is true, as a matter of fact, is not controverted. Regarding the statements of the petition to be true, that the plaintiff was not present as stated, it will be further conceded that there was gross irregularity in the trial, and that the plaintiff was prejudiced thereby; but this could and should have been corrected by moving the district court for a new trial, and, if it was overruled, by appeal. Error, even of a gross and prejudicial character, is materially different from the question of jurisdiction and power of the court to render any judgment in a civil or criminal proceeding.

2. —: —: gross irregularities not avoiding: remedy: habeas corpus.

II. But, as we understand, counsel rely with much greater confidence on the fourth and fifth grounds stated in the petition, and claim that the defendant was deprived of a trial by jury. The record states that a jury was impaneled and sworn to try and determine the question as to plaintiff being guilty of the crime charged,

3. VERDICT: in criminal case: direction by court: non-concurrence of jurors: evidence.

and this is not in any respect controverted. It is, however, alleged that the jury did not consider such question, but, in obedience to the direction of the court, a verdict, which had been prepared by an officer of the court, was signed by one of the jury as foreman, and that no member of the jury in fact passed upon or was allowed to express or take part in determining the question of the guilt or innocence of the plaintiff. In substance, as we understand, the court directed the jury to find the defendant guilty, and caused to be prepared a verdict to that effect. But certainly this in no manner affected the jurisdiction of the court. That it was a gross and palpable error, irregular and wrong, must be conceded; but, as we have said, such wrong can only be corrected by moving the court for a new trial, and, if overruled, an appeal is the only remedy known to the law. The fact that the jury did not consider and determine as to the guilt of the plaintiff, clearly in no manner affects the jurisdiction of the court. Besides this, such fact cannot be established in a collateral proceeding, for the reason that it inheres in the verdict, and the only evidence thereof attainable is that of a juror. The well-settled rule of law is that it is not competent for a juror to so testify.

III. The fifth paragraph of the petition, in substance states that no evidence was introduced except the minutes of evidence before the grand jury, which were reduced to writing by the clerk. But clearly this is not jurisdictional. Nor are we able to conclude that the plaintiff was deprived of any right which he could not have waived, for it has been held that he can waive the constitutional provision requiring that he should be confronted with the witnesses against him. *State v. Polson*, 29 Iowa, 133; *State v. Fooks*, 65 Iowa, 452. Recognizing, as we do, that, conceding the facts stated in the petition, and the affidavits in the record, to be true, gross irregularities and errors were committed by the court, we regret that we are powerless to correct the same in this proceeding without overturning long-established rules of law, and setting a precedent that would

prove, we have no doubt, one that could not be logically followed. Courts must of necessity be governed by general rules applicable to all cases. The forms and procedure of courts cannot be varied to meet special cases. The judgment of the district court is

AFFIRMED.

REED, J., (*dissenting*). In my opinion the court did not have jurisdiction to pronounce judgment against the petitioner. I say this on the assumption, of course, that the averments of the petition are true. In criminal cases, where the plea is not guilty, the court can pronounce judgment imposing the penalty of the law only after a verdict of guilty has been found and returned by the jury. Until that has been done, there is absolutely no power in the court to impose punishment, and any judgment which the court may pronounce, or attempt to pronounce, is necessarily void. Now, a verdict is the judgment of the jury upon the fact. If the verdict has been assented to by the jury,—if it is in fact their judgment,—I admit that it could not be questioned in this character of proceeding, however irregularly that judgment may have been arrived at. But the averment here is that none of the jurors, except the one selected by the court to sign the verdict, and who by direction of the court did sign it, ever assented to it, or had any opportunity to either assent to, or dissent from, the alleged finding. Can it be said that a verdict so obtained is the judgment of the jurors? Clearly not. It is the verdict of the court, but not of the jury. Suppose the court had omitted the formality of calling a jury,—for what was done in that respect was the veriest formality,—but had made up a record showing that the cause had been regularly tried to a jury, who had found the accused guilty, and had then proceeded to pronounce judgment upon the alleged verdict, would anybody contend that the judgment was of any validity, or that it might not be questioned in this character of proceeding? Yet wherein would such a proceeding differ, either in principle or effect, from the one under consideration?

Or suppose, in the case of one under indictment, but who had given bail, the court should, in his absence, proceed to pronounce judgment; being careful, however, to make up a record showing a trial regularly had and a verdict of guilty, is it possible that the accused could not, when an attempt should be made to enforce the judgment, question its validity in this character of proceeding? If not, he would be without remedy; for, as the judgment is regular on its face, an appeal would not avail him. If it be said that it is impossible to conceive that the courts would be guilty of such gross illegalities and irregularities, I answer that, if the case before us was merely supposititious, the same reply might be made. I had supposed that the writ of *habeas corpus* was allowed to the citizen as a means of inquiring into the legality of his imprisonment. In that proceeding the inquiry is as to the legality of the restraint, and if it can be shown, by any means, that the officer or tribunal making the order had no power or authority to make that particular order, the petitioner is entitled to be discharged. The proceeding is not a collateral attack on a judgment, but is an inquiry as to the authority or power of the court to pronounce the judgment. Neither do I agree that the fact that the cause was not submitted to the jury, and that the jurors were not permitted to determine the question of the prisoner's guilt, cannot be shown by their testimony; for as the writing signed by the juror, who was designated by the court to sign it, was in no sense a verdict, nothing inheres in it.

APPENDIX.

NOTES OF CASES NOT OTHERWISE REPORTED.

BERKHOLTZ V. RICHARDS.

Appeal: GUARDIAN'S REPORT: APPROVAL. No review in absence of evidence.

Appeal from Lyon District Court.—HON. G. W. WAKEFIELD, Judge.

FILED, SEPTEMBER 5, 1888.

ON the eleventh day of May, 1887, the appellee, as guardian of the estate of the minor heirs of Herman Berkholtz, deceased, filed a report of his proceedings, including a statement of receipts and expenditures. On the eighteenth day of May, 1887, the appellant filed objections to the report. A trial was had on the issues raised by the report and objections, which resulted in the approval of the report. The appeal is taken from the order of approval.

D. D. McCallum, for appellant.

E. C. Roach, for appellee.

ROBINSON, J.—A motion filed by the appellee to strike from the record the evidence set out in the abstract was sustained at the December term, 1887, of this court. The appellant seeks to have reviewed the allowance of certain items of expense. This cannot be done in the absence of the evidence. The order of the district court is therefore

AFFIRMED.

THE STATE v. BROWN. (*Two Cases.*)

Intoxicating Liquors: INFORMATION FOR SELLING: PLEA OF FORMER CONVICTION FOR NUISANCE. (*State v. Graham*, 73 Iowa, 553. *followed*).

Appeals from Polk District Court.

FILED, OCTOBER 18, 1888.

THESE two cases are appeals by the defendant from convictions upon charges of keeping intoxicating liquors with intent to sell the same in violation of law.

W. S. Sickmon, for appellant.

A. J. Baker, Attorney General, for the State.

ROTHROCK, J.—These appeals present precisely the same question which was determined by this court in *State v. Graham*, 73 Iowa, 553. Following that case the judgments of the district court will be

AFFIRMED.

FARGO & CO. v. PETERSON *et al.*

PITKIN & BROOKS v. THE SAME.

MATTHEWS BROS. v. THE SAME.

Partnership: NO EVIDENCE TO ESTABLISH.

Appeals from Jones District Court.—HON. J. H. PRESTON, Judge.

FILED, OCTOBER 20, 1888.

THE plaintiffs are creditors of a partnership under the name of A. True & Co., which was at one time engaged in the mercantile business in Wyoming, Jones county. By these actions it is sought to establish as a fact that the defendants, J. H. C. Peterson, Henry L. Peterson, W. D. Peterson and Mat Peterson were members of said partnership, and therefore liable for the debts of the firm. The defendants denied

that they were such partners. There was a trial by jury. At the close of the introduction of the evidence in behalf of the plaintiffs, the defendants filed a motion asking that the jury be instructed to find for the defendants. The motion was sustained, and plaintiffs appeal. It should be stated that the jury were sworn to try the first-named action, and that a stipulation was made that the other suits should abide the decision in the case which was tried.

Remley & Ercanbrack, for appellants.

Stewart & White and *Sheean & McCarn*, for appellees.

ROTHROCK, J.—It will be observed from the above statement that the issue presented was purely one of fact—whether the defendants were partners in said firm. It is not claimed that they were partners by any express agreement made between them and the active members of the concern who transacted its business with the public. The defendants were proprietors of a large mercantile establishment at Davenport, and a large part of the goods bought by True & Co. were purchased of them. It was sought to show that by the close relations between the ostensible partners and the defendants, and the manner of doing business between them, the defendants ought to be held as partners.

We have carefully examined the evidence in the case and unite in the conclusion that the district court correctly held that there was no evidence that defendants were members of the partnership, and that there was nothing in the case proper to be submitted to the jury. We need not set out and discuss the evidence.

The court sustained objections made by the defendants to certain evidence offered by the plaintiffs. We think these rulings were correct. The facts sought to be proved were too remote to be regarded as bearing upon the issue in the case.

AFFIRMED.

HUNTER v. EARLY *et al.*

Tax Sale and Deed: SETTING ASIDE: ADJUSTING OF EQUITIES. (*Guise v. Early*, 72 Iowa, 283, and *Buckley v. Early*, 72 Iowa, 289, *followed.*)

Appeal from Sac District Court.

FILED, MAY 8, 1888.

S. M. Elwood and *Ed. R. Duffie*, for appellants.

Mason & Thomas, for appellee.

PER CURIAM.—The material facts and questions for determination are substantially the same as in *Guise v. Early*, 72 Iowa, 283, and *Buckley v. Early*, 72 Iowa, 289, and, following those cases, the judgment of the district court must be

AFFIRMED.

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75 770
86 36

THE HAWKEYE INSURANCE COMPANY v. THE BOARD OF EQUALIZATION OF THE CITY OF DES MOINES.

Life Insurance Company: TAXATION OF MONEYS AND CREDITS: WHAT TO BE DEDUCTED AS INDEBTEDNESS. (*Equitable Life Ins. Co. v. Board of Equalization*, 74 Iowa, 178, *followed*).

Appeal from Polk Circuit Court.

FILED, MAY 10, 1888.

PLAINTIFF is an insurance corporation having its place of business in the city of Des Moines. In 1885 the city assessor assessed it $77,986.47 on moneys and credits. The board of equalization reduced the assessment to forty thousand dollars. Plaintiff appealed to the circuit court. On a hearing on the merits the court entered an order reducing the assessment to $20,945.39, and from that order both parties appeal.

C. P. Holmes and *Barcroft & Bowen*, for plaintiff.

James H. Detrick and *Baylies & Baylies*, for defendant.

REED, J.—Plaintiff's capital stock is one hundred thousand dollars. Of that amount twenty-five thousand dollars has been paid up, and for the remaining seventy-five thousand dollars it holds the obligations of the stockholders. The circuit court held that it was not liable to assessment on either of these amounts, and defendant's appeal is from that part of the order. It also held that plaintiff was liable to assessment on its monies and credits—after deducting from the amount certain unpaid losses, and forty per cent. of the gross premiums—and plaintiff's appeal is from that part of the order. The questions presented are identical with those determined in *Equitable Life Ins. Co. v. The Board of Equalization*, 74 Iowa, 178. Following our holding in that case, the judgment will be affirmed on defendant's appeal. On plaintiff's appeal it will be

REVERSED.

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ABANDONMENT.

1. OF HOMESTEAD. See Homestead, 4.
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ABATEMENT.

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2. OF NUISANCES. See Cities and Towns, 8; Intoxicating Liquors, *passim*; Waters and Watercourses, 2.

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ACCESSORIES.

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ACCORD AND SATISFACTION.

CONSIDERATION: PAYMENT BEFORE DUE. An offer to pay less than the whole amount of a debt before due in full satisfaction thereof, and an acceptance of the offer, and payment accordingly, constitute an accord and satisfaction, supported by a good consideration. *Boyd v. Moats*, 151.

ACCOUNT.

1. WHAT IS: PROOF OF ON DEFAULT. A claim for attorney fees consisting of different items of charges for services, and small disbursements made in the payment of witnesses, and the like, is an account, and in an action thereon, where the petition was verified, and a bill of particulars was attached, and defendant made default, judgment was properly entered without further proof of the claim. (See chap. 36, Laws of 1876). *Eaton v. Peavy*, 740.
2. BOOKS OF: ORDER TO PRODUCE. See Practice, 4; Appeal, 2.
3. ACTIONS ON: LIMITATION OF. See Statute of Limitations, 6, 7.

ACTIONS.

1. ABATEMENT: FORMER ACTION DISMISSED. This action to quiet title is not abated by the fact that plaintiff began a prior action for the same purpose, which was dismissed before this one was tried. (See *Rush v. Frost*, 49 Iowa, 183). *Moorman v. Gibbs*, 537.
2. PREMATURELY BROUGHT. See Insurance, 5.
3. CONDITIONS PRECEDENT TO. See Payment, 2; Replevin, 2; Tender, 1.
4. WHEN ACCRUES. See Statute of Limitations 2, 3; Tax Sale and Deed, 12.

5. FOR DIVORCE: BAR. See Divorce, 2.

6. TO SET ASIDE CONVEYANCE. See Fraudulent Conveyances, 8, 10.

7. ON JUDGMENT: WHAT IS NOT. See Practice, 10.

8. TO RECOVER REAL PROPERTY. See Real Estate, 1.

9. TO QUIET TITLE: DECREE. See Tax Sale and Deed, 8.

10. MISJOINDER OF CAUSES. See Promissory Notes, 8.

11. CHANGE FROM LAW TO EQUITY. See Pleading, 8.

12. LIMITATION OF. See Statute of Limitations.

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ADVERSE POSSESSION.

BY MORTGAGOR PRIOR TO FORECLOSURE. The possession of land by the mortgagor and his grantees prior to a sale of the land upon foreclosure, is possession under an absolute right, and cannot be regarded as adverse to the mortgagee, unless accompanied with a denial of all right in the mortgagee; and the same is true of the possession of the grantee of the mortgagor after a foreclosure and sale to which such grantee has not been made a party, because as to him there has been no foreclosure and sale in law. *Grether v. Clark*, 383.

See HIGHWAYS, 1.

AGENCY.

1. HUSBAND ACTING FOR WIFE: ADMISSIONS BY. Although a husband is accustomed to act as agent for his wife in the management of her property, admissions made by him when not acting for her are not binding upon her, and not admissible as evidence against her. *May v. Sturdivant*, 116.

2. APPARENT AUTHORITY OF AGENT AFTER DISCHARGE. The fact that defendant had honored several drafts drawn by their traveling salesman for personal expenses and indorsed at his request by plaintiffs while he was yet in defendant's employment, did not bind defendant to pay another draft drawn and indorsed by the same parties after his discharge, even though plaintiffs had no knowledge of such discharge. (Compare *Baudouine v. Grimes*, 64 Iowa, 370). *Groneweg v. Kusworm*, 237.

3. WHEN PRINCIPAL NOT BOUND BY AGENT'S KNOWLEDGE. The general rule that the principal is bound by the agent's knowledge is based on the duty of the agent to communicate to the principal his knowledge with reference to the subject of negotiation, and the presumption that he has performed that duty. But the rule does not hold where the circumstances are such as to raise a contrary presumption. And so, where defendant's cashier, not as cashier, but in his own personal capacity, by fraud procured the plaintiff to make to him his accommodation note, which he sold to another bank in exchange for a Chicago draft, which draft the defendant bank cashed through him as its cashier, *held* that, though the bank would have been liable to plaintiff if it had cashed the draft with notice of the fraud, yet, as it was against the cashier's purpose to convey to the bank his knowledge of the fraud, it was not liable to plaintiff as being chargeable with his knowledge as its agent. *Hummel v. Bank of Monroe*, 689.

See BANKS AND BANKING, 1; INSURANCE, 1, 3; REAL-ESTATE BROKER, 1; SALES, 1, 9.

ALIBI.

ALIBI: EVIDENCE: INSTRUCTIONS. (*State v. Maher*, 74 Iowa, 77, *followed*). *State v. Hatfield*, 592.

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1. OF PLEAS. See Pleading, *passim*.

2. OF RECORD ON APPEAL. See Practice in Supreme Court, 1, 7.

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See APPEAL, 6.

ANCIENT ORDER OF UNITED WORKMEN.

See INSURANCE, 8.

APPEAL.

(1) *To Supreme Court.*

1. WHEN IT LIES: ORDER IN PROBATE. An order in probate directing a guardian to pay over the amount of a judgment rendered against him as garnishee in a suit against his ward, is a final order involving a substantial right, from which he may maintain an appeal to this court. (Code, sec. 3164). *Coffin v. Eisiminger*, 30.

2. WHEN IT WILL NOT LIE: ORDER TO PRODUCE BOOKS. An appeal will not lie from an order to a defendant to produce his books in court to be used as evidence by plaintiff. Such order can be reviewed only on appeal after judgment. (Code, sec. 3164). *Cook v. Chicago, R. I. & P. Ry. Co.*, 169.

3. SUPERSEDEAS BOND: EFFECT OF. See Contempt, 1, 2.

4. SECOND APPEAL AFTER AFFIRMANCE ON FIRST. See Practice in Supreme Court, 43.

5. FOR PRACTICE AND PROCEDURE ON APPEALS, see Practice in Supreme Court.

(2) *From Justice's Court.*

6. AMOUNT IN CONTROVERSY: REMITTITUR. In an action in justice's court plaintiff claimed forty dollars, and the jury brought in a verdict for that amount, whereupon plaintiff remitted all but $24.99, and judgment was entered for that amount; but before judgment was entered defendant filed an appeal-bond. *Held* that the amount in controversy for the purposes of an appeal from the judgment was only $24.99, and that, therefore, an appeal would not lie; and that it was immaterial whether the bond was filed before or after the *remittitur*, since there could be no appeal until after judgment, and the bond could be of no effect before its rendition. (Compare *Milner v. Gross*, 66 Iowa, 252). *Schultz v. Chicago, R. I. & P. Ry. Co.*, 240.

7. FILING PAPERS IN APPELLATE COURT: WHAT SUFFICIENT. In section 3583 of the Code, requiring a justice of the peace, when an appeal is taken, to file in the office of the clerk of the appellate court all the original papers and a transcript of his docket, the word "file" means deposit, and when the papers and transcript are so deposited by him, the cause is deemed to be in the appellate court, and the neglect of the clerk to make a note of the filing in the appearance docket is immaterial, as section 200 of the Code, making such entry essential to the proper filing of pleadings, is not applicable. *Harrison v. Clifton*, 736.

(3) *From Board of Supervisors.*

IN SELECTING OFFICIAL NEWSPAPER. See Counties, 4.

(4) *From Award for Right of Way.*

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(5) *From Board of Equalization.*

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INJURY TO BY RAILROADS. See Railroads, 15-22.

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See JUDGMENT, 6, 7.

ARBITRATION AND AWARD.

1. NOT STATUTORY: GOVERNED BY COMMON LAW. The legality and effect of an award not made in accordance with the provisions of the statute must be determined by the rules relating to awards at common law. *Thornton v. McCormick*, 285.

2. CONCLUSIVENESS OF AWARD. A common-law award must be held to be conclusive between the parties as to all matters submitted to arbitration, unless a material mistake appears on the face of the award, or unless equitable grounds for setting it aside are shown. And where both parties have agreed to abide by the judgment of the arbitrators as it should appear in the award, neither can afterwards object to the award on account of errors of judgment on the part of the arbitrators. *Id.*

3. CONSTRUCTION OF AGREEMENT. The agreement for arbitration in this case related to the rights of the parties under a farm lease, which by its terms was to terminate March 1, 1891, but which, by the agreement, was to terminate July 1, 1887. The lease provided that at its termination, at the end of the full term, plaintiff was to leave upon the premises hay, oats, corn, and other articles, equal in quality and amount to that received by him at the beginning of the term; and the agreement for arbitration provided that the rights of the parties to the lease should be the same as though it had terminated regularly. *Held* that the agreement did not contemplate that the place and property should be left July 1, 1887, in the same condition in all respects as the lease required for March 1, 1891, since that was not possible; but only that this provision of the lease should be considered by the arbitrators, and allowance made therefor. *Id.*

4. SUBMISSION AT COMMON LAW: AWARD AGAINST EVIDENCE: REVIEW. The parties in this case saw fit to submit their claims and differences to a tribunal of their own creation, which they invested with exclusive jurisdiction, free from statutory control, and they made the decision of that tribunal final. *Held* that the award could be set aside only upon equitable grounds, and that the want of sufficient evidence to sustain it was not such ground. Accordingly, where the agreement of arbitration did not require witnesses to be sworn, the fact that the arbitrators gave more credence to the unsworn statements of plaintiff than to writings offered by defendant was no ground for disturbing the award. *Id.*

5. ASSAILING AWARD AFTER ACCEPTING BENEFITS. One who has accepted the benefits of an award in part cannot be heard to object to its validity. *Id.*

ARGUMENT.

TO JURY. See Practice, 1.

ASSAULT AND BATTERY.

1. IRRELEVANT EVIDENCE IN DEFENSE. In an action for an assault and battery committed by a master upon his servant, evidence as to how the chores were done by the servant in his absence was immaterial, as a neglect of the chores would not justify the assault and battery. *Redfield v. Redfield*, 435.

2. EJECTION OF TENANT: INSTRUCTION. In an action for an assault and battery committed by defendant in ejecting plaintiff from his house, the court instructed the jury that if plaintiff and husband had been occupying the house with defendant's consent for more than thirty days, then defendant could not eject them without process of law. *Held* that, though plaintiff's tenancy was not in issue by direct averment, the charge was justified by defendant's plea that he had rightfully ejected plaintiff, and by the evidence offered on that issue. *Id.*

3. EJECTMENT FROM HOUSE: NOTICE: INCLEMENT WEATHER. In such case the court instructed that if plaintiff and her husband were boarding with defendant as his employes, still he had no right to eject plaintiff without reasonable notice to enable her to go peacefully, and that defendant would have no right to eject her at unreasonable hours nor in inclement weather, unless she was at the time conducting herself so as to disturb the peace of defendant's household. *Held* that this instruction was justified by evidence that defendant said: "I'll give you until to-morrow morning to get out of here, and, if you don't go, I'll put you out," and that, upon plaintiff saying, "I don't have to get out," he at once ejected her at night and in inclement weather. *Id.*

4. MITIGATION OF DAMAGES: BELIEF OF DEFENDANT. In such case, the court instructed that if defendant acted under the belief that he had a right to eject plaintiff, that fact might be considered in mitigation of his acts, even if they were unlawful. *Held* correct, where the effect of such finding on the question of malice and exemplary damages was properly presented in other instructions. *Id.*

5. EJECTION OF WOMAN FROM HOUSE AT NIGHT AND IN BAD WEATHER: EXCESSIVE VERDICT. In this case it appeared that defendant, violently and without any just cause, ejected plaintiff,—a woman in delicate health,—from his house at night and when the weather was inclement, whereby she sustained injuries, and was compelled to seek shelter at the house of a neighbor. *Held* that a verdict for six hundred dollars actual damages and one thousand dollars exemplary damages could not be disturbed, on appeal, as being excessive. *Id.*

6. EVIDENCE AGAINST ABETTOR. In a civil action against a father and son for an assault and battery, though the evidence failed to show that the father took an actual part in the assault, it did show that. before it was ended, he in an angry and excited manner expressed his interest on the side of his son and a readiness to take a part in the trouble. *Held* that this was sufficient to justify a verdict against him as an abettor. *Cleveland v. Stilwell*, 466.

7. ———. In such case, evidence of the acts and declarations of the father during the fight was competent to show his spirit and purpose in encouraging his son in the matter. *Id.*

8. TWO DEFENDANTS: INSTRUCTIONS. In such case, an objection to an instruction because it does not discriminate between the liability of the father and son is not well taken, where such discrimination is made in other instructions. *Id.*

9. PUNITIVE DAMAGES: INSTRUCTION. In such case, an instruction from which the jury might be warranted in finding punitive damages is no ground for complaint where it appears from the verdict that no such damages were found. *Id.*

See CHATTEL MORTGAGES, 8; CRIMINAL LAW, 7, 8.

ASSAULT WITH INTENT TO RAPE.

1. IDENTIFICATION OF DEFENDANT: EVIDENCE. It being beyond dispute that an assault with intent to rape had been made, the only question was as to whether defendant was the guilty party; and *held* that the evidence (see opinion) was sufficient to justify the jury in concluding that he was. *State v. Hatfield*, 592.

2. CORROBORATION OF COMPLAINANT. The rule of section 4560 of the Code, providing that a person cannot be convicted for rape unless the complaining witness be corroborated by other evidence tending to connect the defendant with the commission of the crime, does not apply to the case of an assault with intent to commit rape. *Id.*

ASSESSMENT.

See TAXATION, 1-3.

ASSIGNMENT.

1. EQUITABLE ASSIGNMENT. See Mortgages, 5.

2. OF TAX-SALE CERTIFICATE. See Tax Sale and Deed, 9-11.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. PRACTICE: ORDER FOR PAYMENT OF CLAIMS. When exceptions have been filed to a claim filed with an assignee, it is proper for the court, upon the hearing of the exceptions, and the determination of the order of the claim in question, to direct the assignee as to the payments he shall make, though neither party requests such order. (Code, secs. 2122, 2123). *In re Assignment of Hooker*, 377.

2. PART OF PROPERTY ONLY: VALIDITY. Section 2115 of the Code makes invalid a *general* assignment for the benefit of creditors which is not made for the benefit of all the creditors in proportion to the amount of their respective claims; but there is no statute depriving a debtor of the common-law right to make a partial assignment of his property for the benefit of his creditors. (Compare *Lampson v. Arnold*, 19 Iowa, 479). *Loomis v. Stewart*, 887.

3. ——— : DEED AS EVIDENCE. A deed of assignment for the benefit of creditors which purports to convey only a part of the assignor's property, is *prima facie* valid as a partial assignment, and is admissible in evidence as such. *Id.*

4. ——— : VALIDITY : INSTRUCTION. The debtor executed a deed of assignment for the benefit of creditors, purporting to convey only his personal property. Shortly before its execution, he conveyed his real estate to a creditor in satisfaction of a debt. The court directed the jury that if the deed for the real estate was executed in pursuance of a definite prior agreement between the debtor and the creditor, in such sense that its execution and that of the deed of assignment were not in reality parts of one and the same transaction, the assignment was not invalid. *Held* that the instruction was not objectionable on account of the failure to direct the jury as to what would be a valid agreement for the conveyance of the real estate; because, since the assignment purported to be partial only, the question of its validity depended only on whether it was in fact so; that is, whether the deed of the real estate and the assignment were not so connected in point of time and in intention as to form parts of the same transaction, and thus constitute a general assignment; which question was properly submitted. (*Burrows v. Lehndorff*, 8 Iowa, 96, and *Cole v. Dealham*, 13 Iowa, 551, *distinguished*). *Id.*

5. VALIDITY : EVIDENCE. The fact that an assignor has withheld a part of the assigned property and appropriated it to the payment of a particular creditor will not invalidate the assignment, since the title to the property nevertheless passes to the assignee. And where the question before the court is the validity of the assignment, evidence of such facts is properly excluded as immaterial. *Id.*

See STATUTE OF LIMITATIONS, 7.

ASSIGNMENT OF ERRORS.

See PRACTICE IN SUPREME COURT, 2, 3.

ASSOCIATIONS.

UNINCORPORATED. See Churches.

ATTACHMENT.

1. LEVY : WHEN COMPLETE : PLACING GUARD AT DOOR. A levy upon goods is not accomplished until the officer has done some act in relation to the goods which, but for the writ, would amount to a trespass. And so, where an officer, with a writ in his possession, intending to levy on a stock of goods, went to the building where they were kept, but found it locked, and placed a guard at the door until he should get a key, but, failing to get one, he returned in a reasonable time and broke into the house and took possession, *held* that there was no levy until the entrance was effected, and that the levy did not relate back in time to when he first went upon the premises with intent to make it. *Hibbard v. Zenor*, 471.

2. OF GOODS UNDER MORTGAGE : VALIDITY : NOTICE BY MORTGAGEE OF HIS INTEREST. The levy of an attachment on mortgaged chattels is not void, though the amount of the mortgage debt is neither tendered nor deposited, as required by section 1, chapter 117, Laws of 1886, where the attaching creditor contests the validity of the mortgage. (See section 4, of said act). And in such case the provisions of the act do not affect the requirement of chapter 45, Laws of 1884, that persons claiming the property must give the officer notice of their claims. *Id.*

3. WRONGFUL: ACTION ON BOND: ATTORNEY'S FEES. Under section 2961 of the Code, where there is a recovery on an attachment bond for the wrongful suing out of the attachment, an attorney's fee may be allowed the plaintiff, even though he recover but nominal damages. *Lyman v. Lauderbaugh*, 481.

4. UNRECORDED DEED: PRIORITY. An unrecorded deed takes precedence over a subsequent attachment or judgment, though the creditor has no notice thereof. *Moorman v. Gibbs*, 537.

5. INTERVENTION: RELEASE: WHO AFFECTED BY. A settlement between an attachment plaintiff and an intervenor, whereby some of the property is discharged, does not affect the rights of one who has a prior unrecorded deed of attached real estate. *Id.*

6. WRONGFUL SUING OUT: PROOF. The wrongful suing out of an attachment is not established by proof that the party who caused it to be issued had no reasonable ground to believe that the allegations upon which it was issued were true. There must be proof, also, that they were not true in fact. (Compare *Vorse v. Phillips*, 87 Iowa, 428). *McCormick Harv. Mach. Co. v. Colliver*, 559.

See FRAUDULENT CONVEYANCE, 9; GARNISHMENT; JURISDICTION, 1.

ATTORNEY AT LAW.

1. AUTHORITY OF. See Mortgages, 5.

2. NUMBER OF COUNSEL IN ARGUMENT TO JURY. See Practice, 1.

3. MISCONDUCT OF COUNSEL IN ARGUMENT AND EXAMINING WITNESSES. See Practice, 2, 3.

4. MISCONDUCT OF: REVIEW ON APPEAL. See Practice in Supreme Court, 34.

ATTORNEY'S FEES.

See ATTACHMENT, 8; INTOXICATING LIQUORS, 3.

BAIL.

See CRIMINAL LAW, 10, 11.

BAILMENT.

1. DISTINGUISHED FROM SALE. See Sales, 4.

2. ACTION AGAINST BAILEE. See Statute of Limitations, 3.

BANKS AND BANKING.

AUTHORITY OF CASHIER: PAYING DEPOSITOR WITH NOTES. The cashier of a bank has no authority by virtue of his office to pay a depositor by transferring notes to him; and in the absence of special authority in the cashier to make such transfer, the depositor will be regarded as holding the notes, or their proceeds, in trust for the bank, when garnished by its creditors. *Schneitman v. Noble*, 120.

See AGENCY, 3; TRUSTS, 1

BILLS AND NOTES.

See PROMISSORY NOTES.

BILL OF LADING.

See CARRIERS, 1.

BOARD OF SUPERVISORS.

1. SPECIAL MEETINGS: NOTICE: WHAT SUFFICIENT. Under section 301 of the Code, six days' notice to each member of the board of supervisors of a special meeting of the board is not required where the notice is personally served, but only in cases where it is served by leaving it at his place of residence; nor is it necessary that one week's notice of such meeting be given to the public when it is given by publication in a newspaper, but only when it is given by posting. And in this case, where personal notice of the special meeting was served on the supervisors four days prior to the meeting, and general notice was given by five days' prior publication in a newspaper, *held* that it was sufficient to make the special meeting valid. *Supervisors of Mitchell County v. Horton*, 271.

2. ——: VALIDITY: ESTOPPEL OF MEMBERS AND OTHERS. Where certain members of the board of supervisors had notice of a special meeting, and were present thereat, and protested against the validity of the meeting on the ground that the notice was insufficient, but they afterwards participated in the business transacted thereat, which was the revocation of an order made at a former meeting, whereby a certain bridge was to be constructed, and the protesting members had been appointed a committee to contract for its construction, *held* that such members were afterwards estopped from questioning the validity of the revoking order on the ground of the insufficiency of the notice of the special meeting. Also, that one who knew of all these facts could not afterwards make a legal contract with the protesting members for the construction of the bridge. *Id.*

3. ——: NOTICE: PUBLICATION. A notice of a special meeting of the board of supervisors was published on slips of paper which contained nothing else except the name of the newspaper in which they were folded, with the word "Supplement" added; and the validity of the publication was objected to on the ground that the "supplement" was not sent to all the subscribers. But as there was nothing to justify the conclusion that the omission to send the "supplement" to each subscriber was other than accidental, nor that any considerable number of subscribers were affected by it, *held* that the objection was not well grounded; the rule being that if the paper is published and distributed in the usual manner, without intent to suppress any copies, it is sufficient. *Id.*

4. ——: POWER TO RESCIND FORMER ACTION. The board of supervisors at a regular meeting ordered the construction of a bridge and appointed a committee to contract therefor. Before any contract had been made, the board, at a special meeting, reconsidered and rescinded their action in regard to the bridge. *Held* that it had power so to do, and that the members who had been appointed as the committee could not complain that they were thereby deprived of the right to contract for the construction of the bridge. *Id.*

5. ——: WHAT MAY BE DONE. There is no reason why business imposed upon the board of supervisors may not be transacted as properly at a special as at a regular meeting, if it be specified in the request for and notice of the meeting; excepting in cases where, from the nature of the business, or the provisions of the law in regard to it, the purpose or policy of the law, or the rights of others, requires that it be done at a regular meeting. *Id.*

See COUNTIES, 1, 6; COUNTY TREASURER, 1.

BODY-STEALING.

See CRIMINAL LAW, 5.

BONDS.

1. SIGNATURE BY REFEREE: PERSONAL LIABILITY. See Churches, 2.

2. OF COUNTY CLERK: LIABILITY ON. See Sureties, 4.

3. ATTACHMENT BOND. See Attachment, 3.

See GUARDIAN, 1, 2.

BOUNDARIES.

1. PROCEEDINGS TO ESTABLISH LOST CORNER: APPEAL: TRIAL DE NOVO: EVIDENCE. A proceeding to establish a lost corner is not triable *de novo* upon an appeal to this court (see cases cited in opinion), and the finding of the court below on the question of fact cannot be disturbed for want of evidence, where the evidence was conflicting. *Bohall v. Neiwalt*, 109,

2. ———: APPORTIONMENT OF COSTS. The costs of a proceeding to establish a lost corner should, under section 4, chapter 8, Laws of 1884, be apportioned among the parties according to their respective interests, regardless of the benefits resulting from the proceeding. And in this case, where the corner in question was one common to four quarter sections of land of equal value, and plaintiff was the owner of one of them, and the defendants of the other three, *held* that not more than one-fourth of the costs should have been taxed to plaintiff. *Id.*

3. ESTABLISHING LOST CORNER: EVIDENCE ON APPEAL. A proceeding under the statute to establish a lost corner is not triable *de novo* upon appeal; and where in such case the evidence was conflicting as to the actual original location of the corner, and the court below adjudged it to be at a point where it was not located by the field-notes of the original survey, but where some of the witnesses testified that they had often seen the mound and pit by which it was originally marked, *held* that this court could not interfere with such finding. The rule in such cases being that courses and distances must yield to fixed monuments, the trial court was not bound by the original field-notes. *Walrod v. Flanigan*, 365.

See PUBLIC LANDS, 1.

BRIDGES.

1. WHAT IS COUNTY BRIDGE: TWO BRIDGES CONNECTED BY GRADE: QUESTION FOR JURY. The defendant county built a bridge fifty feet long, resting on stone abutments, over a stream, and another bridge thirty-six feet long, also resting on stone abutments, over an arm or bayou of the same stream. These bridges were a part of the same public highway, and were only twenty feet apart, and the intervening portion of the highway was graded up to the common level of the bridges. In an action for injuries occasioned by a defect in the shorter bridge, *held* that it was error for the court to hold, as matter of law, that the shorter bridge was not a county bridge because it was not forty feet in length (Code, sec. 527); but that it was a question for the jury whether the two bridges did not in fact constitute, with the intervening grade, one structure, for negligence in regard to which the county would be liable. *Casey v. Tama County*, 655.

2. ——: LIMIT OF FORTY FEET. Viewed in the light of the settled policy of the state, and of the public interest, and of other provisions of the statute (Code, secs. 303, 990, 994), the proper meaning of section 527 of the Code is that it fixes absolutely the liability of counties for public bridges, over streams crossing state and county highways, which exceed forty feet in length, and that their liability for constructing and maintaining bridges forty feet or less in length is not affected by said section, but depends upon the necessity and importance to the public of each bridge, its character and cost, and the financial ability of the road-district in which it is situated to construct and maintain it. *Id.*

3. ——: WHETHER ON PUBLIC HIGHWAY: QUESTION FOR JURY. In an action for an injury by reason of a defective bridge, there was evidence tending to show that the highway on which the bridge was located, including the crossing at the bridge, had been used by the public, and worked by the road supervisor, and improved by the defendant county, for more than twenty years. *Held* that it was error for the court to determine, as matter of law, that the bridge was not located on a public highway, but that the question should have been submitted to the jury. *Id.*

4. ——: LOCATION OUTSIDE OF COUNTY: QUESTION FOR JURY. Under chapter 40, Laws of 1878, a county may have a bridge outside of its own limits, for whose maintenance it may be liable. And where the evidence established acts of the defendant tending to show its recognition of its liability for the maintenance of the bridge in question, though just outside of its own limits, the question of its liability should have been submitted to the jury. *Id.*

BUILDING CONTRACT.

See COUNTIES, 2, 3.

CARRIERS.

1. OF GOODS: DELIVERY TO HOLDER OF UNASSIGNED BILL OF LADING: LIABILITY. A company, shipping goods upon the order of E., marked and consigned them to itself at P., the place where E. lived. It took two bills of lading for the goods, which were in fact duplicates, but neither showed that another had been issued. It then drew a draft on E., through a bank at P., for the price of the goods, and sent with it to the bank an order on defendant to deliver the goods to E., with directions to the bank to deliver the order to E. upon the payment by him of the draft. At the same time it sent one of the bills of lading to E., instructing him that the goods had been shipped, and that he was to pay the draft and obtain the order. The bill of lading sent to E. showed the consigning company to be the consignee, and it was not indorsed or assigned by that company. Upon presentation of this bill of lading the defendant railway company delivered the goods to E., who was at the time insolvent, and who never paid for the goods. *Held* that such delivery was without warrant, and that the defendant company was liable to the consigning company for the value of the goods, though it was ignorant of E.'s insolvency, and that the goods had not been paid for, and that a draft and order had been sent and instructions given in regard to the goods. (See opinion for a discussion of the question upon the authorities, by ROBINSON, J.) *Weyand v. Atchison, T. & S. F. Ry. Co.*, 573.

2. ——: ——: CUSTOM. In such case it was no defense that there was a local custom at P. to deliver goods to the person who held the bill of lading, such custom not being general, and the consigning company having no knowledge of it when the goods were shipped. *Id.*

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CERTIORARI.

See CONTEMPT, 1.

CHANGE OF VENUE.

See VENUE.

CHATTEL MORTGAGES.

1. INSUFFICIENT DESCRIPTION: PAROL EVIDENCE TO AID: ACTUAL NOTICE. A chattel mortgage which describes the property as "one six 1-2 foot cut Plano harvester and binder," without more, is insufficient to charge third parties with notice; but where the mortgagee, as in this case, seeks to recover of a constable for levying upon and converting the mortgaged property, and it is shown that the execution plaintiff had actual notice of the mortgage and of the property claimed under it, *held* that parol evidence might be introduced to identify the property, and that the mortgage itself was then admissible in evidence. (See opinion for cases followed and distinguished). *Plano Mfg. Co. v. Griffith*, 102.

2. ——: LEVY ON PROPERTY: DAMAGES: EVIDENCE OF LEVY. In an action by a mortgagee of chattels against a constable for levying upon and converting the property, where the court has held that the mortgage is void, and judgment is rendered for defendant, it is no ground for the affirmance of the judgment on appeal that plaintiff failed to prove the levy and sale of the property; for to have done so would have been of no avail. *Id.*

3. DEATH OF MORTGAGOR: METHOD OF COLLECTING SECURED DEBT. After the death of a mortgagor of chattels, the mortgagee may, upon breach of the conditions of the mortgage, proceed to foreclose by notice and sale under the statute, just as he might have done had the mortgagor survived, and he is not required to file his claim and submit to the slow process of administration to adjust priorities and determine his rights. *Cocke v. Montgomery*, 259.

4. OF STOCK OF DRUGS: FORECLOSURE SALE BY ONE NOT A PHARMACIST. It would seem that the law providing that only registered pharmacists shall sell drugs has no reference to stocks of drugs sold under foreclosure or judicial sales. *Id.*

5. LEVY ON MORTGAGED PROPERTY: NOTICE. When an officer knows that property upon which he is about to levy is mortgaged, though he does not know to whom, he cannot escape liability to the mortgagee if he makes the levy and converts the property. *Coleman v. Reel*, 304.

6. RECORD: WHEN CONSTRUCTIVE NOTICE BEGINS. A chattel mortgage filed for record does not impart constructive notice to third persons until the entries required by section 1925 of the Code have been made by the recorder in the index. A custom of the recorder to defer making such entries until the next morning, when a paper is filed near the close of the business day, does not change the rule as to a mortgage so filed. *Hibbard v. Zenor*, 471.

7. FILING FOR RECORD: NOTICE: INSTRUCTION. The court instructed the jury as follows: "The delivery of the instrument (chattel mortgage) to the recorder, and the stamping the same as filed by such recorder, is not a record which will impart constructive notice; nor will any person be bound by the record, *or notice of such instrument, until the proper description thereof is entered in the entry-book or index-book*, as provided by law. *Held* not objectionable on account of the italicized portion, since, in another part of the instruction, the jury were told in clear and express terms that actual notice would be as binding as the record would have been if made. *Id.*

8. DISPUTE AS TO VALIDITY: SEIZING PROPERTY UNDER: PERSONAL VIOLENCE: CONSTABLE. One who is about to take possession of chattels under and by virtue of a mortgage in his possession, and is resisted by the mortgagor on the ground that the mortgage is invalid, must desist from his purpose when he finds that it can be accomplished only by the use of such force as would cause a breach of the peace; and if he proceeds and commits such acts as, under other circumstances, would amount to an assault and battery, he will be guilty of that offense. And the fact that he is a constable makes no difference; for in such a transaction he does not act in his official capacity, but only as the mortgagee's agent. *State v. Boynton*, 753.

9. DUTY OF MORTGAGEE TO PRESERVE AND APPROPRIATE PROPERTY. See Promissory Notes, 4.

See ATTACHMENT, 2: CRIMINAL LAW, 8; FRAUD, 2; FRAUDULENT CONVEYANCE, 4; GARNISHMENT, 4-6.

CHURCHES.

1. UNINCORPORATED: ACTION BY TRUSTEES. Upon a division of a religious society under an agreement for an apportionment of its property between the new societies organized by the several factions, the trustees of one of the new societies, appointed for the purpose of collecting its dues from the other new society under the contract of division, are the proper parties to bring an action for that purpose, though the society for which they act is not incorporated; and the fact that the name of the society is joined with theirs as plaintiff does not affect their right to recover. (See Code, sec. 2544, and cases cited in opinion). *Arts v. Guthrie*, 674.

2. ACTION AGAINST REFREE: PERSONAL LIABILITY. Where the maker of a bond for the payment of a debt due from a church is described therein as a referee, but it requires him to make the payment therein provided for, not in a representative capacity, but as an individual, he cannot escape personal liability thereon, and such is the bond set out in the opinion in this case. *Id.*

3. USE OF CHURCH: CONSIDERATION FOR BOND. While the title to all the property of a congregation was in the bishop of the church, for the use, however, of the congregation, the sale of the exclusive right to such use by one portion of the congregation to the other, upon a division of the congregation into two societies, and the actual exclusive use thereof by the purchasing faction, was a valid consideration for a bond given to the other faction for such exclusive use. [REED, J., *dissenting*]. *Id.*

4. BEQUEST IN TRUST FOR UNINCORPORATED CHURCH. See Wills, 8.

CITIES AND TOWNS.

1. STREET RAILWAYS: MONOPOLY OF PASSENGER TRAFFIC: ORDINANCE CONSTRUED. An ordinance of the city of Des Moines, granting to the Des Moines Street-Railroad Company the exclusive right for thirty years to use its streets for the construction and operation of street railways, to be operated by animal power only, and providing further that "the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company," does not deprive the said city of the power to confer upon another company, before the expiration of the thirty years, authority to build railways on its streets to be operated by power other than animal power. The diminution of the revenues of the first company on account of the operation of the second one is not such an impairment of its rights and privileges as is contemplated in, and prohibited by, the ordinance. (*Railroad Co. v. Railway Co.*, 73 Iowa, 513, *distinguished*). *Teachout v. Des Moines, B. G. St. Ry. Co.*, 722.

2. INJURY THROUGH DEFECTIVE WALK: NOTICE OF DEFECT: EVIDENCE. In an action for an injury occasioned by a defective sidewalk which had been built eleven years, the defendant was chargeable with notice of the manner in which the walk was constructed, and there was evidence tending to show that a walk so constructed was, or was liable to become, unsafe. *Held* that a verdict implying that the walk was defective, and that defendant had knowledge of its defects, was not without support in the evidence, though it was shown that no defect was apparent to the ordinary observer at the time of the injury. *Weber v. City of Creston*, 16.

3. ———: DEFECTIVE CONSTRUCTION: CUSTOM NO DEFENSE. In such case it was no defense that the custom of defendant was to build its walks in the same defective manner as the one in question. *Id.*

4. ———: MEASURE OF DAMAGES. In such case, where the evidence tended to show physical and mental suffering, and that the injury might in some degree be permanent, *held* that plaintiff's recovery was not necessarily limited to the amount that he would have earned during the time lost, and what he paid for medicine, aggregating $47.40, but that a verdict of four hundred dollars could not be interfered with as excessive. *Id.*

5. ———: ———: INSTRUCTION. In such case the defendant asked the court to instruct the jury that they could allow plaintiff no exemplary damages whatever; only what his time was worth, and any doctor's bills that he may have paid. *Held* that it was properly refused, because, while plaintiff was not entitled to exemplary damages, the instruction did not otherwise properly state the law in regard to the measure of his damages. *Id.*

6. OFFICERS: COMPENSATION: ALTERATION BY CONTRACT DURING TERM. Under section 491 of the Code, which provides that the compensation of no city officer shall be increased or diminished during his term of office, it is incompetent for a city treasurer to bind himself by contract with the city council to perform certain duties of his office for a less compensation than is provided by the ordinances in force when he entered upon his office; and such contract is no bar, after the services have been rendered, to a recovery of the compensation provided by ordinance. *Purdy v. City of Independence*, 356.

7. TREASURER: COMPENSATION FOR COLLECTING MONEYS: MEANING OF "COLLECTING." The ordinances of the defendant city provided that the treasurer should have, as part compensation, one per cent. on all collections made by him, except on moneys received from the county treasurer, for which he was to have no compensation. The city, through its mayor, negotiated certain of its bond through certain brokers, and the treasurer received the money derived therefrom. *Held* that such money was collected by him, within the meaning of the ordinance, and that he was entitled to his percentage thereon. *Id.*

8. NUISANCES: ABATEMENT BY CITY: REMEDY: ACTION IN EQUITY. A city cannot maintain an action in equity to enjoin and abate a nuisance on the ground of injury to its citizens, since that remedy is given only to "any person injured thereby." (Code, sec. 3331). But the authority of the corporation to abate a nuisance, given by section 456 of the Code, is to be exercised in the enforcement of an ordinance enacted under section 482 of the Code. Whether if the corporation as such were specially injured by the nuisance, it might not then maintain an action in equity, under section 3331 of the Code, is not decided. (See opinion for citations). *City of Ottumwa v. Chinn*, 405.

9. TAXATION: NOTICE OF SPECIAL ASSESSMENTS: WHAT SUFFICIENT. When notice of a special assessment on city property to pay for street improvement is necessary to be given to the respective owners, and the city has provided by ordinance for giving such notice by publication in a newspaper of general circulation published in the city, notice given in accordance with the provisions of such ordinance is sufficient, and personal notice is not required. (See opinion for citations). *Lyman v. Plummer*, 353.

See PEDDLING.

CITIZENSHIP.

WHO IS CITIZEN. Any male person over twenty-one years of age, who has his present home and domicile in any county, although it may be for a temporary purpose, is a citizen of that county, provided he has a fixed intention of remaining there for an indefinite period of time, and has no home, domicile, or right of citizenship elsewhere. *Fuller v. McDonnell*, 220.

See INTOXICATING LIQUORS, 5.

CODE.

See STATUTES CITED, CONSTRUED, ETC.

COMPENSATION OF OFFICERS.

See CITIES AND TOWNS, 6, 7.

CONSIDERATION.

See ACCORD AND SATISFACTION, 1; CHURCHES, 3; CONTRACTS, 1; FRAUDULENT CONVEYANCE, 4; PAYMENT, 3.

CONSPIRACY.

1. TO EXTORT MONEY: VOLUNTARY PAYMENT: PLEADING. A petition for damages for the extortion of money by a conspiracy stated that a note was first obtained, and that it was afterwards paid because of the continued existence of the fear excited by what was said to the plaintiff at the time the note was obtained. *Held* that the petition was not bad as showing a voluntary payment. *Hablichtel v. Yambert*, 539.

2. ——: ——: EVIDENCE. Where a note was obtained of the plaintiff through fear, by means of a conspiracy, and was paid three days afterwards, and there was evidence tending to show that it was agreed that plaintiff would get the money and pay the note within that time, and plaintiff testified that she paid through her continued fear, and she was a German, sixty-one years old, imperfectly acquainted with our language, and with no one to counsel her in the matter, *held* that the jury was justified in finding that the payment was made, not voluntarily, but through fear. *Id.*

3. TO PROCURE WILL: EVIDENCE: DECLARATIONS OF CONSPIRATORS. See Wills, 6, 7.

CONSTABLE.

See CHATTEL MORTGAGES, 8.

CONSTITUTIONAL LAW.

See CRIMINAL LAW, 2.

CONTEMPT.

1. PROCEEDINGS TO PUNISH: WHEN CERTIORARI LIES. Proceedings to punish for a contempt may be reviewed by *certiorari*, whether the defendant has been punished or not, in all cases where a substantial right, either public or private, is involved, which can only be protected or enforced by the proceeding in contempt. So *held* where the district court refused to punish for the violation of a liquor nuisance injunction, on the ground that the power to punish was suspended by the defendant's taking an appeal and filing a *supersedeas* bond. *Lindsay v. Clayton District Court*, 509.

2. VIOLATION OF INJUNCTION: PUNISHMENT AFTER APPEAL TAKEN AND SUPERSEDEAS BOND FILED. The taking an appeal from a decree abating and enjoining a liquor nuisance, and the filing of a *supersedeas* bond, does not suspend the injunction, but only the abatement of the nuisance, and for a violation of the injunction pending the appeal, the defendant may be punished for contempt. (Compare *Jayne v. Drorbaugh*, 63 Iowa, 711). *Id.*

See INTOXICATING LIQUORS, 1.

CONTINUANCE.

1. CHANGE OF ISSUES: SHOWING NECESSARY. A party is not, as a matter of right, entitled to a continuance for the purpose of taking further testimony on account of amendments changing the issues. If he has additional testimony which he desires to take to meet the change of issues, he must so show by affidavit. *Barnes v. Hekla Fire Ins. Co.*, 11.

2. DILIGENCE. A continuance on account of the absence of a witness was properly denied, because it did not appear that due diligence had been used to secure his attendance. *George v. Swafford*, 491.

CONTRACTS.

1. PAROL AGREEMENT SUBSEQUENT TO WRITING: CONSIDERATION. A parol agreement made subsequent to the completion of a written contract concerning the same subject is not binding unless supported by some new consideration. *Carruthers v. McMurray*, 173.

2. TO PAY ANOTHER'S DEBT: MONEY HAD AND RECEIVED: RECOVERY. Plaintiff sold a lot to defendant and received his pay in land. Under the agreement it was his duty to pay certain interest on a mortgage on the lot and certain accrued taxes, but, as a separate transaction, defendant agreed to pay such interest and taxes for plaintiff, in consideration of receiving the latter's promissory note for the amount. The note was given and paid, but defendant neglected to pay plaintiff's said debts. His creditors were not parties to the arrangement, and there was no subrogation. *Held* that plaintiff could recover of the defendant the money paid on the note, and interest, without himself first paying the debts which defendant had agreed to pay. *Messenger v. Votaw*, 225.

3. MENTAL INCAPACITY: EVIDENCE. The evidence in this case (see opinion) *held* not to support the claim of plaintiff that her husband, at the time he made the chattel mortgages in question, had not sufficient mental capacity to transact such business. *Cocke v. Montgomery*, 259.

4. SPECIFIC PERFORMANCE: CONVEYANCE OF LAND: BAD FAITH OF PLAINTIFF. Defendant told plaintiff that he had withdrawn certain real estate from sale. Within forty-eight hours, at the farthest, after being so informed, plaintiff resorted to defendant's agents and procured from them a contract for the purchase of the land. They had had no notice of the withdrawal, and plaintiff did not inquire as to the date of the authority under which they acted. *Held* that he acted in bad faith in procuring the contract, and that equity would not enforce it at his suit. *Wickham v. Winchester*, 327.

5. WITH FIRM: CONDITIONS: EVIDENCE. The plaintiff firm had recently been organized, and it consisted of three persons, of whom M. and B. were two. These two had a conversation with defendant's agent to the effect that they were to have a certain rebate on every car of stock shipped by them over defendant's road, provided the "pool broke" or the rates were "cut." The agreement was with M. and B. personally, as defendant's agent knew nothing at that time of the plaintiff firm. The plaintiff firm now seeks to recover the rebate, but *held* that the evidence (see opinion) failed to show that the pool was broken or the rates cut, and that, therefore, the conditions of the agreement had never been fulfilled, conceding that plaintiffs were entitled to its benefits if they had been. *Marsh v. Chicago, R. I. & P. Ry. Co.*, 361.

6. REFORMATION: NEGLIGENCE OF PLAINTIFF. Where a party to a contract, through his own negligence, signs it without knowing or understanding its contents, when he has an opportunity to do so, a court of equity will not reform it so as to make it express his alleged understanding of what it was to contain. *Roundy v. Kent*, 662.

7. BETWEEN ATTORNEY AND CLIENT: REFORMATION: EVIDENCE. Plaintiff seeks a reformation of the contract in question on the ground that the other party to it was his attorney, in whom he placed special confidence, but who misled him as to its contents. But *held* that the evidence fairly showed that the contract expressed the intent of the parties when it was signed, and that, therefore, the allegation of special confidence was immaterial. *Id.*

8. FOR SALE OR COLLECTION OF NOTES: INTERPRETATION. The contract involved in this case (see opinion), *held* to be a contract for the sale of notes, and not merely for their collection. *Id.*

9. TO RECEIVE "PROPERTY" IN PAYMENT: INTERPRETATION. A contract for the sale of notes, in which the seller agrees to take in payment all "property" taken in their collection, binds him to accept real as well as personal property. *Id.*

10. ULTRA-VIRES CONTRACTS. See Counties, 1-3.

11. REFORMATION. See Insurance, 1.

12. TO REPAY MONEY ON CONDITION. See Payment, 3-5.

13. SEVERABLE CONTRACTS: GAMBLING: PLACE OF PERFORMANCE. See Sales, 6.

14. RESCISSION IN EQUITY. See Real Estate, 2, 5.

15. RESCISSION BY PARTIES. See Sales, 7.

FOR CONTRACTS OF VARIOUS KINDS, see appropriate titles.

CONVEYANCE.

1. SPECIFIC PERFORMANCE. See Contracts, 4

2. UNDUE INFLUENCE: RESCISSION IN EQUITY. See Real Estate, 2, 5.

3. DESCRIPTION. See Tax Sale and Deed, 2, 5.

CONVERSION.

See TRESPASS, 1.

CORPORATIONS.

1. AMENDMENTS TO ARTICLES: ACKNOWLEDGMENT AND RECORDING. The articles of incorporation of a company organized for pecuniary profit can be amended only by an instrument signed and acknowledged by a person or persons duly authorized so to do, and recorded, in the same manner as is required for original articles by section 1060 of the Code. *Day v. Mill-Owners' Mut. Fire Ins. Co.*, 694.

2. RIGHT OF STOCKHOLDER TO ENJOIN ULTRA-VIRES ACTS. A stockholder in a corporation may maintain an action to restrain the corporation from acts in excess of its corporate authority. *Teachout v. Des Moines B. G. St. Ry. Co.*, 722.

3. FOREIGN: JURISDICTION OF. See Jurisdiction, 1.

4. RAILROADS: FORFEITURE OF FRANCHISES BY NON-USER. See Railroads, 6.

See INSURANCE, 7; MUNICIPAL CORPORATIONS.

FOR CORPORATIONS OF VARIOUS KINDS, see appropriate titles.

COSTS.

1. RECOVERY ON COUNTER-CLAIM: APPORTIONMENT: PRESUMPTION ON APPEAL. It appears from the certificate of the trial judge in this case that the amount of plaintiff's demand was reduced by a finding for defendants upon a counter-claim pleaded by them. *Held* that in such case an apportionment of the costs was proper; and though the amount taxed to plaintiff would seem to be excessive, yet, since the facts in the case, as known to the court, may have been such as to justify the apportionment, this court must presume that the facts were such, and that the order was right. *Minnesota Stoneware Co. v. Knapp*, 561.

2. OF ADDITIONAL ABSTRACT. See Practice in Supreme Court, 40, 41.

3. IN PROCEEDINGS TO ESTABLISH LOST CORNER. See Boundaries, 2.

4. OF DEFENDANT'S WITNESSES: WHEN PAID BY COUNTY. See Criminal Law, 14.

COUNTER-CLAIM.

WHAT IS NOT. See Promissory Notes, 7.

COUNTIES.

1. CONTRACT FOR COURTHOUSE: IN EXCESS OF AMOUNT VOTED: ULTR A VIRES. The people of the defendant county voted seventy-five thousand dollars to build a courthouse. The plaintiff contracted to build the house for that amount according to certain plans and specifications. The contract provided for possible changes in the plans and specifications, the differences of cost on account of which were to be added or deducted, as the case might be. Changes were made which greatly increased the cost of the work, and the additional amounts which plaintiff was to have for such changes were agreed upon, but no corresponding changes were made to diminish the cost of the work. *Held* that all agreements whereby the total cost of the work was to exceed the sum of seventy-five thousand dollars were in excess of the authority of the supervisors, and therefore void, and that plaintiff could recover nothing on account thereof; and that the case was not altered by the fact that the people afterwards voted an additional sum to complete the building which plaintiff failed to finish under his contract. (See opinion for cases cited). *King v. Mahaska County*, 329.

2. ULTRA-VIRES CONTRACT: PAYMENT: CONCLUSIVENESS. Where changes subsequently made in a contract for the erection of a courthouse contemplated and involved an expenditure of money in excess of the amount voted therefor, but the work done under these additional and void contracts was paid for in the periodical estimates made by the architect, and afterwards the contractor brought an action against the county for a large sum of money, involving all the transactions between the parties, based on the several contracts, *held* that, by the payment of the architect's estimates, the county was not concluded from insisting that the additional contracts were illegal, and that all the money paid should be regarded as paid on the amount named in the original contract. (*Long v. Boone County*, 36 Iowa, 60, *distinguished*). *Id.*

3. CONTRACT FOR COURTHOUSE: VOID CHANGES: FAILURE TO COMPLETE: RECOVERY. Plaintiff agreed to complete a courthouse for defendant for a certain sum. Subsequent changes were made in the contract, providing for the payment of a larger sum, but they were void. Upon a failure to complete the house, the county, under the provisions of the contract, took possession of and completed it. In an action against the county for an alleged balance due the plaintiff, it appeared that more than the original contract price had already been expended, and that the building was not then completed. *Held* that plaintiff's obligation was to complete the house for the original contract price, and that he was not entitled to recover the ten per cent. which had been retained out of each month's installment to secure the completion of the work. *Id.*

4. SELECTION OF OFFICIAL NEWSPAPERS: CONTEST: APPEAL. Where a newspaper has been selected to do the county printing, under chapter 197, Laws of 1884, subject, however, to a contest as provided by that chapter, no appeal can be taken until there has been final action upon the contest. *Hoxie v. Shaw*, 427.

5. ——— : TIME FOR ACTION. Although the statute provides that the board of supervisors shall select the newspapers to do the county printing at its January term, that provision does not prevent the board from taking final action upon a contest at a subsequent term, when the business has been entered upon at the January term, but for some reason (the equal division of the members present, in this case) final action could not sooner be reached *Id.*

6. REJECTION OF CLAIM PRESENTED : RECOVERY IN EXCESS OF. Plaintiff demanded of the defendant county five hundred dollars for injuries to his wife on account of a defective bridge, and the claim was rejected. He then brought action for that amount, but afterwards, by amendment, demanded a larger amount, on the ground that her injuries were much more serious than at first supposed. *Held* that it was error to allow a recovery for a larger amount, since no claim therefor had been presented to the board of supervisors, as required by section 2610 of the Code. *Marsh v. Benton County*, 469.

7. LIABILITY FOR COSTS OF DEFENDANT'S WITNESSES. See Criminal Law, 14.

8. NEWLY-ORGANIZED COUNTY : RIGHT TO TAXES. See Tax Sale and Deed, 1.

See BRIDGES.

COUNTY TREASURER.

FUNDS TRANSFERRED BY PREDECESSOR : MANDAMUS TO PAY OVER. Action of *mandamus* to compel defendant, as county treasurer, to pay over to the plaintiff company certain taxes collected for its use by his predecessor in office, and by such predecessor transferred to the county fund by order of the board of supervisors. *Held* that such transfer was such an appropriation of the money as to release defendant from all liability to plaintiff on account of it, and that the action would not lie. *Minneapolis & St. L. Ry. Co. v. Becket*, 188.

COURTS.

See JUDGES.

COVENANTS.

See STATUTE OF LIMITATIONS, 2.

CRIMINAL LAW.

1. INDICTMENT : PLACE OF CRIME : NEAR COUNTY LINE : LOCATION IN WRONG COUNTY. Under section 4160 of the Code, providing that "when a public offense is committed on the boundary line of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county," the defendant was indicted in Ringgold county for stealing a dead body in said county from a certain named cemetery, which the evidence on the trial showed to be situated in the adjoining county of Taylor, but within five hundred yards of the line dividing those counties. *Held* that the failure of the indictment to state accurately the place where the offense was committed was in no respect prejudicial to defendant, and, under section 4306 of the Code, no ground for reversal. [SEEVERS, C. J. *not concurring*]. *State v. Pugsley*, 742.

2. JURISDICTION OF OFFENSES NEAR COUNTY LINE: CODE, SECTION 4160: CONSTITUTIONALITY. Section 4160 of the Code, providing that, "when a public offense is committed on the boundary line of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county," is not invalid under that provision of the constitution which provides that "the right of trial by jury shall remain inviolate;" said section having been the law of the state from a date prior to the adoption of the first constitution. *Id.*

3. EVIDENCE: MOTIVE FOR CRIME. It is always competent to prove facts constituting a motive on the part of defendant for committing the alleged crime. And so, in a prosecution for body-stealing, where the theory of the state was that the crime was a part of a plan for procuring insurance upon the life of a person who was not in fact dead, and there was evidence tending to establish such theory, the policies of insurance were properly admitted. *Id.*

4. INDICTMENT AS PRINCIPAL: EVIDENCE OF AIDING AND ABETTING. An indictment charging the defendant as principal may be supported by evidence showing him to have been an accessory, since accessories are principals, under Code, section 4314. *Id.*

5. BODY-STEALING: EVIDENCE OF UNLAWFUL DISINTERMENT. The court did not err in submitting to the jury a prosecution for body-stealing, on the ground that there was no evidence to show that the body was disinterred without lawful authority, where the evidence tended to show that the disinterment was made secretly, during the night-time, and that the body was concealed for several days, and that an attempt was then made to burn it. *Id.*

6. NOTICE TO DEFENDANT AS TO WITNESSES: SERVICE: RETURN: VERIFICATION. A notice was served by the sheriff upon the defendant that the state would introduce a witness not named on the indictment. The sheriff's return, presumed to be written on the notice, stated that he served the "within notice" on the defendant by reading to him, and by delivering to him personally a copy thereof. *Held* that the return was not objectionable as showing that a copy, and not the original notice, was read to him; nor on the ground that the return was not verified,—such verification being unnecessary when service is made by the sheriff. *Id.*

7. ASSAULT AND BATTERY: INFORMATION: REQUISITES. An information for an assault and battery which charged that the defendant "did then and there violently beat, bruise, wound and ill-treat" the complainant, contrary to the statute, etc., is sufficient, without charging that the acts complained of were done in an angry and wilful manner, and with a purpose to inflict bodily injury. *State v. Boynton*, 758.

8. ——: IN TAKING MORTGAGED PROPERTY: MISTAKE OF LAW: MITIGATION OF FINE. Persons who commit an assault and battery in attempting forcibly to take possession of mortgaged chattels as agents of the mortgagee, after they have been informed of the mortgagor's claim that the mortgage is invalid, cannot have their sentence, otherwise not excessive, mitigated, on the ground that they acted honestly, but under mistake; for their mistake was of law only, which the law does not excuse. *Id.*

9. OBTAINING PROPERTY ON FALSE PRETENSES: FORMER ACQUITTAL. A trial resulting in an acquittal upon an indictment for uttering and publishing as true a certain false and forged note and chattel mortgage, is a bar to a subsequent prosecution on an indictment for obtaining property in exchange for said note and mortgage, upon false pretenses, where the transaction relied on in both indictments is the same. *State v. Stone*, 215.

10. BAIL: MONEY DEPOSITED IN LIEU OF: FORFEITURE: WHEN CONSUMMATED: RECOVERY FROM COUNTY. Plaintiff deposited money with the clerk of the district court as security for the appearance of another at the November term to answer to an indictment. At said term the accused failed to appear and was defaulted, and her security forfeited; but at the next January term said default and forfeiture were, upon a sufficient showing, set aside by the court. Before such setting aside, however, the clerk of the court, by order of the board of supervisors, had turned over the deposit to the county treasurer, who carried it to the credit of the temporary school fund. It appearing that there was money in said fund, not appropriated, equal to the amount of said deposit, plaintiff in this action sought by *mandamus* to compel the supervisors to order said sum refunded to her. Upon consideration of sections 4596–4600 of the Code, *held*—

(1) That the entry of default and forfeiture made at the November term did not, without more, authorize the county to appropriate the money.

(2) That the court was authorized to set aside the default and forfeiture at the next January term.

(3) That plaintiff was entitled to a writ of *mandamus* for an order to refund the money. *Arquette v. Supervisors Marshall County*, 191.

11. MURDER: BAIL AFTER CONVICTION PENDING APPEAL. Under chapter 103, Laws of 1878, which provides that "no defendant convicted of murder shall be admitted to bail," and which must be regarded as repealing all prior inconsistent legislation, one convicted of murder in the second degree is not entitled to be admitted to bail pending an appeal to this court from the judgment of conviction. *Baldwin v. Westenhaver*, 547.

12. VERDICT: DIRECTION BY COURT: NON-CONCURRENCE OF JURORS: EVIDENCE. Where the court directed a verdict of guilty in a criminal case, *held* that the fact that the jury did not determine or consider as to the guilt of the defendant could not be established in a collateral proceeding, for the reason that it inheres in the verdict, and the only evidence thereof attainable is that of a juror, which is not competent to prove such fact. [REED, J., *dissenting.*] *Turney v. Barr*, 758.

13. JUDGMENT FOR FINE AND COSTS: IMPRISONMENT IN DEFAULT OF PAYMENT: INTERPRETATION. A judgment that the defendants each pay a fine of fifty dollars, and $62.75 costs, and that in default thereof they stand committed to the county jail for fifteen days, is not illegal as being a judgment for imprisonment for costs; but the imprisonment clause will be held to relate only to the fine, since as to that it is not in excess of the statute. (Code, sec. 4509). *State v. Boynton*, 753.

14. COSTS OF DEFENDANT'S WITNESSES: WHEN TO BE PAID BY COUNTY. Under chapter 207, Laws of 1880, when the court or judge, prior to the trial of a criminal case, upon the application of defendant, and a showing as to the materiality of witnesses for defendant, orders such witnesses to be subpœnaed, and they are subpœnaed, the county becomes liable for their fees and mileage, without any order to that effect being made at or subsequent to the trial; but, as held in *Jones County v. Linn County*, 68 Iowa, 63, the order may also be made at the trial, or when judgment is pronounced. *Wheelock v. Madison County*, 147.

15. RIGHT OF STATE TO APPEAL. See Intoxicating Liquors, 23.

16. PLEA OF FORMER CONVICTION. See Intoxicating Liquors, 25.

17. JUDGMENT OF IMPRISONMENT: GROSS IRREGULARITIES: HABEAS CORPUS AS REMEDY. See Judgment, 14, 15.

18. AS TO OFFENSES RELATING TO INTOXICATING LIQUORS, see that title.

19. ASSAULT WITH INTENT TO RAPE. See that title.

CUSTOM.

See CARRIERS, 2; CITIES AND TOWNS, 8; INSURANCE, 11.

DAMAGES.

1. BREACH OF AGREEMENT TO LOAN MONEY TO REDEEM MORTGAGED LAND. In an action for the breach of an agreement to loan to the owner of land the money necessary to redeem it from a mortgage, whereby the land was lost to the owner, neither the value of the land, nor the profit which the owner might have reaped from its purchase, affords the legal measure of recovery; and, in the absence of any other averments of damage, the plaintiff's recovery must be but nominal. *Thorp v. Bradley*, 50

2. ON DELIVERY BOND. See Execution, 1.

3. NO REVERSAL FOR NOMINAL DAMAGES. See Practice in Supreme Court, 32.

4. FOR FAILURE TO DELIVER. See Sales, 8

5. FOR CUTTING AND CONVERTING HAY. See Trespass, 1.

6. FOR PERSONAL INJURIES. See Assault and Battery, 4, 5; Cities and Towns, 4, 5; Personal Injuries, 2.

DECREE.

See JUDGMENT.

DEDICATION.

See HIGHWAY, 1, 2.

DEED.

1. UNRECORDED: ATTACHMENT: PRIORITY. See Attachment, 4.

2. COVENANTS: BREACH. See Statute of Limitations, 2.

3. SUFFICIENCY OF DESCRIPTION. See Tax Sale and Deed, 2, 5.

4. UNDUE INFLUENCE: RESCISSION IN EQUITY. See Real Estate, 2, 5.

See PUBLIC LANDS.

DEFAULT.

1. IN ACTION ON SWORN ACCOUNT: EVIDENCE. See Account, 1.

2. SETTING ASIDE. See Judgment, 12, 13.

DEMAND.

See PAYMENT, 2; REPLEVIN, 2.

DESCRIPTION.

See CHATTEL MORTGAGES, 1; TAX SALE AND DEED, 2, 5; PUBLIC LANDS.

DIVORCE.

1. DRUNKENNESS: CORROBORATION OF PLAINTIFF. In an action by a wife for a divorce on the ground of the habitual drunkenness of her husband, although there was no direct corroboration of her testimony to the effect that he acquired the habit after marriage, yet as the testimony of the other witnesses tended indirectly to establish that claim, *held* that this was sufficient corroboration, under section 2222 of the Code. *Lewis v. Lewis*, 200.

2. DISMISSAL OF ACTION UPON AGREEMENT: BREACH: NEW ACTION: BAR: RESTORATION OF PROPERTY. After an action for divorce had been begun on the ground of habitual drunkenness, it was dismissed upon an agreement of defendant to convey to plaintiff certain property, and to abstain from the use of intoxicating liquors. The contract was reduced to writing, but the agreement to abstain was inadvertently omitted. The property was conveyed, but the promise to abstain was broken, and defendant again became habitually intoxicated. In a new action for divorce upon the same ground, *held* that parol was admissible to show the real conditions of the agreement on which the prior suit had been dismissed; and that that agreement, in view of the breach of the condition as to future sobriety, was no bar to another action; and that, upon granting a decree of divorce, equity would not order a reconveyance of the property conveyed under the agreement, especially as plaintiff did not ask any relief by way of permanent alimony. *Id.*

3. CRUELTY: EVIDENCE: CORROBORATION. Action for divorce on the ground of cruel and inhuman treatment. The evidence discloses mutual violence between the parties, and much vile and abusive language applied by each to the other, but fails to show which of the parties was the aggressor, and plaintiff is not corroborated as to the matter constituting the alleged cause of action. *Held* that the evidence did not justify a decree of divorce. *Potter v. Potter*, 211.

4. ALIMONY: SUBSEQUENT ALLOWANCE FOR SUPPORT OF CHILD. Plaintiff in a prior action procured a divorce from defendant, and the custody of their child, and five hundred and twenty-five dollars alimony. Prior to the decree the parties agreed that, in case a divorce was granted, plaintiff should have the child, and five hundred and twenty-five dollars in full of her share of the property, and that she should care for, support and educate the child. *Held* that she could not maintain a subsequent suit for additional money for the support of the child; not, at least, without showing a change in the circumstances of the parties. (*Reid v. Reid*, 74 Iowa, 681, *followed*). *White v. White*, 218.

5. CUSTODY OF CHILD. See Parent and Child, 1.

See HUSBAND AND WIFE, 5.

DOMESTIC RELATIONS.

See DIVORCE; HUSBAND AND WIFE; PARENT AND CHILD; REAL ESTATE, 2, 3, 5.

ELECTIONS.

OF SCHOOL TREASURER: HOLDING OVER. See Schools and School Districts, 1.

EMPLOYER AND EMPLOYE.

See MASTER AND SERVANT.

EQUITY.

1. JURISDICTION. An action to enforce an equitable lien is properly brought as an action in equity. *Schafer v. Schafer*, 349.

2. REFORMATION OF CONTRACT. See Contracts, 6, 7.

3. RESCISSION OF DEED. See Real Estate, 2, 5.

4. EQUITABLE DEFENSE NOT BARRED. See Statute of Limitations, 9.

See EXECUTION, 2; FRAUDULENT CONVEYANCE, *passim*; JUDGMENT, 4; REDEMPTION, 1.

ESTATES OF DECEDENTS.

CLAIMS AGAINST: STATUTE OF LIMITATIONS. Claims against an estate, based on promissory notes, were made up and approved by the executor and filed with the clerk within six months after notice of the appointment of the executor, but no formal approval of the claims was made of record by the clerk, and no order of approval was made by the court. The executor made partial payments, and he and the claimants seem to have thought that nothing further was necessary to be done to authorize payment in full. Seven years later the claimants appeared and were allowed to prove up the claims. *Held* that they were authorized so to do—the claims being of the third class, as defined by sections 2420 and 2421 of the Code, and therefore not barred by a failure to prove them up within twelve months from notice of the executor's appointment, and no prejudice to the estate having been shown on account of the delay in proving them up. (Compare *Smith v. McFadden*, 56 Iowa, 482). *Schriver v. Holderbaum*, 83.

See CHATTEL MORTGAGES, 3; PARTITION, 1.

ESTOPPEL.

1. OWNERSHIP OF PROPERTY IN ANOTHER'S POSSESSION. Where plaintiff bought property of H., which H. had in his possession and claimed to own, but which he had previously sold to intervenor, *held* that intervenor was not estopped to set up his claim to the property unless he had knowledge of the acts of H., nor unless plaintiff relied upon the conduct of intervenor, as showing title in H., when he made his purchase. *Van Horn v. Overman*, 421.

2. BY SILENCE: EVIDENCE. The silence of one of the plaintiffs in the presence of a conversation between one of the defendants and a third person in regard to the contract in question did not work an estoppel, where he did not at the time know the terms of the contract, and was under no obligation to speak; and evidence of such facts was properly excluded. *George v. Swafford*, 491.

See BOARD OF SUPERVISORS, 2; FRAUDULENT CONVEYANCE, 5; GARNISHMENT, 2, 3; INSURANCE. 7; RAILROADS, 2.

EVIDENCE.

1. NOT RELEVANT TO ISSUES. In an action for money loaned, evidence showing liability for failure to pay a draft is irrelevant. *Groneweg v. Kusworm*, 237.

2. WEIGHT: COMPETENCY. Measurements of a depression in a street, taken some time after an accident caused thereby, and after the depth of the depression had increased, were competent to show the condition at the time of the accident, where other testimony showed the amount of the change. *Nesbit v. Town of Garner*, 314.

8. ABILITY TO WRITE: HEARSAY. Intervenor introduced papers purporting to be signed by H. Plaintiff, in order to show that H. could not write his name, offered evidence to prove that he employed others to write for him, and that he did not keep his account-book in writing. *Held* that this was properly excluded as proving nothing as to his ability to write his name; and that his statements to others that he could not write were properly excluded as hearsay,—he not being a party to the suit. *Van Horn v. Overman*, 421.

4. OPINION: COMPETENCY. A woman who was accustomed to drive over a railway track where a flagman was stationed, every day, and sometimes five or six times a day, was competent to testify that she knew the flagman's signal to stop and to go on, and that he gave the signal to go on at the time in question. *Buchanan v. Chicago, M. & St. P. Ry. Co.* 393.

5. LEADING QUESTIONS: DISCRETION OF COURT: APPEAL: OBJECTION NOT MADE BELOW. The state asked one of its witnesses a leading question, to which defendant objected, but the court, in some remarks made in the presence of the jury, overruled the objection. No objection was then made to these remarks. *Held* that none could be heard in this court; also, that it was within the sound legal discretion of the trial court to allow leading questions, and that this court could not interfere where no abuse of such discretion is shown. *State v. Pugsley*, 742.

6. ERROR IN ADMITTING: CURED BY INSTRUCTION. The admission of improper evidence in this case was no ground for reversal, where the court in its charge directed the jury not to consider it, especially as the same evidence had, in substance, already been given, without objection on the part of the appellant. *Redfield v. Redfield*, 435.

7. EXCLUSION: ERROR CURED BY SPECIAL VERDICT. The exclusion of evidence relating solely to the measure of plaintiffs' damages for the breach of an alleged contract cannot be regarded as material, after the jury has specially found that the alleged contract never had an existence. *Carruthers v. McMurray*, 178.

8. ERRORS CURED BY VERDICT. Alleged errors in admitting and excluding evidence on a count of the petition on which only nominal damages are found against defendant are no ground for reversal on his appeal. *Lyman v. Lauderbaugh*, 481.

9. ERROR IN ADMISSION: CURED BY JUDGMENT. Error in admitting evidence of special damages is no ground for the reversal of a judgment which does not include any special damages. *Coleman v. Reel*, 804.

10. SECONDARY: ON POINT NOT IN ISSUE. The admission of secondary evidence to prove an allegation of the petition which is not denied, and therefore is admitted, cannot prejudice defendant. *Eslich v. Mason City & Ft. D. Ry. Co.*, 448.

11. SECONDARY: ON POINT ADMITTED. The admission of secondary evidence upon a point alleged in the answer, and admitted by plaintiff in answer to special interrogatories appended to the answer, is no ground for reversal. *Hayward v. Fullerton*, 371.

12. ADMISSION OF SECONDARY: ERROR CURED. An error in admitting secondary evidence is cured where the same point is afterwards established by the primary evidence. *Amos v. Buck*, 651

13. EXCLUSION: SUBSEQUENT ADMISSION IN SUBSTANCE. A party suffers no prejudice from the exclusion of testimony which he is afterwards, without objection, allowed to give in substance. *Redfield v. Redfield*, 435.

14. CREDIBILITY OF WITNESS: CONTRADICTORY STATEMENTS: QUESTION FOR JURY. The fact that plaintiff's testimony on a material point differed from his testimony given on a former trial went only to his credibility, and it was for the jury to say, after hearing his explanation of the contradiction, whether his last testimony was worthy of belief. *Henry v. Sioux City & P. Ry. Co.*, 84.

15. PRACTICE: CONTRADICTION OF ONE'S OWN WITNESS. When a party makes his adversary his own witness, he may not offer evidence tending to assail his reputation for truth and veracity; but he may prove by another witness a different state of facts, and then ask the jury to determine which has told the most reasonable story. (Compare *Humble v. Shoemaker*, 70 Iowa, 228). *Gardner v. Connelly*, 205.

16. RESIDENCE OF WITNESS: TENDENCY TO DISGRACE AND IMPEACH. It is always allowable to ask a witness where he resides and how long he has resided there; and if he happens to be residing in the county jail awaiting trial upon an indictment for larceny, he will not be excused from answering such questions on the ground that his answers might incidentally tend to disgrace him, affect his credibility or weaken his evidence. *State v. Pugsley*, 742.

17. PERSONAL TRANSACTION WITH ONE DECEASED. In an action by the personal representatives of a decedent involving the title to land, the testimony of defendant and his wife, that by an oral contract with the deceased the defendant purchased and paid for the land in question, was incompetent, under section 3639 of the Code; and the fact that one of the plaintiffs testified to searching among the papers of decedent for a certain conveyance did not open the door for such incompetent testimony. *Cochrane v. Breckenridge*, 218.

18. DECLARATIONS OF DECEASED PERSONS. The law will not permit the declarations of a deceased person to be introduced in evidence in favor of his adminstrator, unless they were, when made, against his own interest. *Westcott v. Westcott*, 628.

19. PAROL TO AID DEFECTIVE DESCRIPTION. See Chattel Mortgages, 1; Sales, 2.

20. IN CRIMINAL CASES. See Criminal Law, 3, 5.

21. PRODUCING BOOKS OF ACCOUNT. See Practice, 4.

22. ON APPEAL. See Practice in Supreme Court, 4, 5, 8–11, 14, 19, 26, 29, 30, 36–39, 48.

23. PAROL TO VARY WRITING. See Promissory Notes, 10.

24. PROOF OF SWORN ACCOUNT ON DEFAULT. See Account, 1.

25. ADMISSIONS. See Agency, 1.

FOR EVIDENCE ON PARTICULAR SUBJECTS, see appropriate titles.

EXECUTION.

1. LEVY: DELIVERY BOND: REPLEVIN BY DEFENDANT: JUDGMENT FOR SHERIFF: DAMAGES ON BOND. A sheriff levied an execution in favor of plaintiff on certain property of defendants, but they gave a bond for the delivery of the property. Afterwards they brought actions against the sheriff for the title of the property, but were defeated, and the sheriff recovered judgment for the value of the property, which judgment was paid, and the money paid to plaintiff; but it was not sufficient to satisfy plaintiff's judgment. In an action by plaintiff on the delivery bond, *held* that he was entitled to recover only nominal damages. *Stuart v. Trotter*, 96.

2. SUPPLEMENTARY PROCEEDINGS: FOUNDATION. The return of an execution *nulla bona* is a good foundation for a proceeding in equity to ascertain defendant's interest in real estate, and to subject it to the payment of the judgment. *McCormack Harv. Mach. Co. v. Gates*, 343.

See INNOCENT PURCHASER, 1.

EXTORTION.

See CONSPIRACY, 1, 2; PAYMENT, 3–5.

FALSE PRETENSES.

See CRIMINAL LAW, 9.

FENCES.

See RAILROADS, 18, 21–23.

FILING PAPERS.

WHAT SUFFICIENT. See Appeal, 6.

FINES.

See CRIMINAL LAW, 8; INTOXICATING LIQUORS, 14.

FORCIBLE ENTRY AND DETAINER.

1. FORFEITURE OF LEASE: EVIDENCE. In an action of forcible entry and detainer against a tenant on the ground that he had forfeited his lease, evidence that the defendant did not properly cultivate the farm and care for the stock leased therewith was properly excluded, since the lease did not provide that for such negligence the lessor might elect to terminate it. *Harrison v. Clifton*, 736.

2. ———: TIME FOR DELIVERING SHARE: CONSTRUCTION. The lease in question bound the defendant to pay, as rent, one-half of the crops, and one-half of the cream and butter, and provided that, for a failure to pay any of the rent for a period of ten days after due, the plaintiff might declare the lease forfeited and proceed by forcible entry and detainer. In such proceeding, based upon an alleged failure to deliver half the cream, *held* that the lease did not provide when the cream should become due, and that a delivery of a proper amount of cream within a reasonable time during the term was sufficient. *Id.*

FORECLOSURE.

See ADVERSE POSSESSION, 1.

FORMER ACQUITTAL.

See CRIMINAL LAW, 9.

FORMER ADJUDICATION.

SWAMP-LAND CONTRACT: VALIDITY: TITLE UNDER. The plaintiff brought an action to secure a decree annulling a contract for the conveyance of its swamp lands and indemnity swamp lands, and its swamp-land scrip, to the American Emigrant Company; but the court dismissed plaintiff's petition, without prejudice to its right to sue said company for breach of the contract. (See *Am. Em. Co. v. Adams County*, 100 U. S. 61). *Held* that this was an adjudication that the contract was valid and binding, and that such adjudication was a bar to this action, by the same plaintiff, against a grantee of said company, to divest the latter of his equitable title to land included in said contract. *Adams County v. Graves*, 642.

FORMER CONVICTION.

See INTOXICATING LIQUORS, 25.

FRAUD.

1. PROOF: DEGREE OF EVIDENCE. Fraud, like any other fact, may be established by a preponderance of the evidence; and an instruction that "it may be proved by circumstances from which the inference of fraud is natural and incontrovertible," was erroneous, as calling for too high a degree of evidence. *McCreary v. Skinner*, 411.

2. IN CONVEYING GOODS: EVIDENCE: INSTRUCTION. Where the validity of a chattel mortgage from husband to wife was questioned, the court instructed the jury that before they could find fraud to exist they must find that the wife joined with her husband with the intent to carry out the purpose of defrauding his creditors, and actually participated therein, with the pretense of securing a claim owing to her by her husband. *Held* that the use of the word "pretense" was indefinite and probably misleading. *Id.*

3. ——: WHAT CONSTITUTES: INSTRUCTION. A conveyance of property with intent to hinder and delay creditors is fraudulent, without any intent to actually defraud; and an instruction making the intent to defraud a necessary ingredient was erroneous. *Id.*

See TRUSTS, 1.

FRAUDULENT CONVEYANCE.

1. TO WIFE AND SONS: RIGHT TO PREFER CREDITORS. A husband and father conveyed substantially all of his property to his wife and two sons. The evidence shows that he was indebted to his wife for money advanced, and to one of the sons for labor performed and property sold, and that the value of the property conveyed to each of them did not exceed the amount of his indebtedness to them severally, but that he was not indebted to the other son. He was at the time largely indebted to plaintiffs and others. In an action by plaintiffs to set aside the conveyances and subject the property to the payment of their judgments, *held* that he had a right to prefer his wife and the son to whom he was indebted, and to secure them by the conveyances, and that as to them the relief asked was properly denied; but that such relief was properly granted as to the son to whom the father owed nothing. *Rockford Boot & Shoe Mfg. Co. v. Mastin*, 112.

2. GIFT TO DAUGHTER: SUBSEQUENT CREDITORS. Where a father, when solvent and out of debt, and with no intention of contracting debts, conveyed land as a gift to his daughter, *held* that subsequent creditors could not have the conveyance set aside and the land subjected to the payment of their claims. *Rock Island Stove Co. v. Walrod*, 479.

3. HUSBAND AND WIFE: BURDEN OF PROOF. One who attacks a wife's title to real estate on the ground that it was bought with her husband's money and is held in fraud of creditors, has the burden to prove the fraud; and this cannot be done by mere inference. based on the presumption that her testimony is untruthful. *Gilbert v. Glenny*, 518.

4. BY CHATTEL MORTGAGE: WHAT IS: EVIDENCE. A chattel mortgage given to indemnify a surety on a bond is based upon a valid consideration; but where it is also the purpose of the parties thereby to delay and hinder the creditors of the mortgagor, the mortgage is fraudulent as to such creditors. And in this case, where it appeared that the execution of the mortgage was, on the part of the mortgagor, only one of a series of transactions designed to delay and hinder his creditors, and force them to a compromise, and that the mortgagee, a few days after its execution, was engaged in aiding him in his fraudulent enterprise, and made no attempt to explain his conduct in that regard when he had the opportunity, *held* that he was properly chargeable with a participation in the fraudulent purpose when he accepted the mortgage. *Bryant v. Fink*, 516.

5. ATTACHING CREDITORS: AGREEMENT: JUDGMENT. In a contest for priority between a chattel mortgagee and attaching creditors, in which the mortgage was assailed as fraudulent, the mortgagee agreed to the appointment of a receiver upon the condition that the receiver should pay him the amount of one of the notes secured by his mortgage; and this was done accordingly. The court found that none of the notes was based on a good consideration. It was *held*, however, that, since one of the notes was paid under said agreement, by which the other creditors obtained an advantage, the mortgagee was entitled to hold the money so paid, and that the judgment should so provide. *Id.*

6. CONSPIRACY: EVIDENCE. The evidence in this case considered (see opinion), and *held* insufficient to establish a conspiracy to defraud creditors by the conveyances in question, or to show bad faith in any of the conveyances. *Des Moines Ins. Co. v. Lent*, 522.

7. GOOD FAITH OF GRANTEE: CONSIDERATION. Where a daughter had money in her father's hands, and he conveyed land to her, and charged her on his books with the price of it, and she, though possibly not authorizing these transactions at the time, afterwards accepted the deed as being in accord with her wishes, and she had no knowledge of any claim that the conveyance was one of a series designed to defraud the creditors of a former holder of the land, *held* that she was a *bona-fide* purchaser for a sufficient consideration. *Id.*

8. ACTION TO SET ASIDE: INTERVENTION: LIS PENDENS. Where one creditor brings an action to set aside, in his favor, a conveyance alleged to be fraudulent as to him, and another creditor comes in and alleges that the conveyance is also fraudulent as to him, and asks for similar relief as to himself, he is not an intervenor, within the meaning of Code, section 2683, because he is not interested in the matter in litigation, nor in the success of either of the parties to the action, nor against both; but he is a mere interloper, and his pleadings are unknown to the law and can have no legal effect. Consequently, a petition of intervention, so called, in such a case does not give constructive notice, under the doctrine of *lis pendens* (Code, sec. 2628), that such person claims an interest in the land. *Id.*

9. GOOD-FAITH PURCHASER FROM FRAUDULENT GRANTEE: PRIOR ATTACHMENT. One who purchases land from a fraudulent grantee, with neither actual nor constructive notice of the fraud, and for a valuable and adequate consideration, will hold it against the creditors of the original fraudulent grantor; and the fact that they may have attached the land as the property of their debtor is immaterial, unless such purchaser has notice thereof; and the entrance of the attachment in the incumbrance book as against their debtor is not constructive notice to such purchaser of any cloud upon the title of his immediate grantor. *Halverson v. Brown*, 702.

10. ACTION TO SET ASIDE: FOUNDATION FOR. Until a creditor in some manner obtains a lien on his debtor's property, or has exhausted his remedies at law, or done what is equivalent thereto, he cannot question in equity a fraudulent conveyance or incumbrance of his property made by such debtor, and have the same set aside. Accordingly, *held* that the relief granted by the decree in this case (see opinion) was in excess of plaintiff's rights. (*Buchanan v. Marsh*, 17 Iowa, 494, *followed*; *Joseph v. McGill*, 52 Iowa, 127, *distinguished*). *Goode v. Garrity*, 713.

See MORTGAGES, 7.

GAMBLING.

See SALES, 6.

GARNISHMENT.

1. QUESTIONING VALIDITY OF JUDGMENT AGAINST PRINCIPAL DEBTOR. A garnishee in an attachment suit cannot, on the trial of an issue joined upon his answer, assail the validity of the judgment against the attachment defendant, on the ground that such defendant was not duly served with notice of the action, where there was a service in fact of the original notice, though defective, but which the court adjudged to be sufficient to give it jurisdiction. (See opinion for cases cited). *Schneitman v. Noble*, 120.

2. ESTOPPEL OF GARNISHEE BY FORMER PLEA. The garnishee herein sought to retain the proceeds of certain notes which had belonged to the attachment defendant, on the ground that they had been turned over to him in satisfaction of a debt; but *held* that he was estopped from making this claim by the fact that, after he had received the notes he brought action against the attachment defendant on that same debt, and alleged that it had not been paid, and thereupon recovered judgment. (Compare *Citizens' Bank v. Dows*, 68 Iowa, 460). *Id.*

3. ESTOPPEL OF GARNISHEE TO DENY INDEBTEDNESS: REPRESENTATIONS LEADING TO SUIT. A garnishee in an attachment suit induced the plaintiff to begin the action and to garnish him, by representing that he was indebted to defendant in the action, thus leading the plaintiff to incur trouble and expense which would be lost unless recovered through the garnishee. *Held* that the garnishee was not thereby estopped to deny his indebtedness to defendant,—his liability to plaintiff being, at most, the actual expenses incurred by the latter in reliance upon the representations. *Henderson v. McMahill*, 217.

4. OF PERSONS IN POSSESSION OF DEBTOR'S MORTGAGED CHATTELS: CHATTELS TAKEN ON MORTGAGE: LIABILITY. Where persons who were in the possession of the debtor's mortgaged chattels, as his agent, were attached as garnishees, and the property was taken from them by the mortgagees by virtue of the mortgages, they were properly discharged from liability. (See opinion for citations). *Booth v. Gish*, 451.

5. ——— : NO LIEN CREATED. In such case the garnishment created no lien on the property or its proceeds, and did not affect the rights of a second mortgagee whose mortgage was made subsequent to the garnishment. *Id.*

6. ——— : SALE ON FORECLOSURE : SURPLUS. In such case, as the first mortgagee was not garnished, the surplus remaining in his hands, after satisfying his claim, was not reached by the process, but was subject to garnishment by another creditor. *Id.*

See BANKS AND BANKING, 1.

GIFT.

1. EVIDENCE : PRIOR DECLARATIONS OF INTENT. Plaintiff and defendant are brothers, and the former held the latter's note for a sum of money loaned to him. In an action on the note, defendant claimed that plaintiff had given the note to him, and this was the only issue in the case. Defendant was allowed to introduce evidence of plaintiff's declarations of his intention to execute the gift, made prior to the time of its alleged execution. *Held* that this testimony was properly admitted, but that it was error afterwards to exclude evidence of other declarations of plaintiff, made to a third person only a few hours prior to the time of the alleged execution of the gift, in which he expressed his intention to insist upon the payment of the note. *Sherman v. Sherman*, 136.

2. ——— : IRRELEVANT MATTERS. In such case evidence as to the amount of interest included in the note, and as to when the money was loaned, or what plaintiff had given to other relatives, was irrelevant to the issue. *Id.*

3. PRESUMPTION FROM POSSESSION : EVIDENCE TO OVERCOME. The defendant, as against his mother's administrator, claimed that certain money which he had loaned, and for which he held the notes payable to himself, was given to him by his mother, before her death, with the intention that it should be his absolutely. *Held* that the possession of the money by him, and the execution of the notes to him, raised a presumption of ownership in him, which was not overcome by the other evidence in the case, which consisted of declarations and statements of the mother in regard to her intentions with reference to the division of her property, even if such declarations were competent. *Westcott v. Westcott*, 628.

See FRAUDULENT CONVEYANCE, 2.

GUARDIAN.

1. SALE OF WARD'S LAND : VALIDITY : NEGLECT TO FILE ADDITIONAL BOND. The sale of an infant's land by his guardian upon the order of court, without filing an additional bond, as required by the order and by section 2261 of the Code, ought not to be approved by the court; but where the sale and deed have been erroneously approved, they cannot be successfully attacked in a collateral proceeding. (Compare *Bunce v. Bunce*, 59 Iowa, 533). *Hamiel v. Donnelly*, 93.

2. ——— : ——— : PETITION NOT SWORN TO : DEFECTIVE NOTICE : BOND APPROVED BY CLERK. Nor can such sale be collaterally attacked, after approval by the court, on the ground that the guardian's bond was approved by the clerk in vacation, and not by the court; nor upon the ground that the petition for the sale was not verified; nor upon the ground that the notice was served upon the ward three days before the guardian's appointment was consummated; these being but irregularities not defeating the jurisdiction of the court. (Compare *Shawhan v. Loffer*, 24 Iowa, 228; *Bunce v. Bunce*, 59 Iowa, 533). *Id.*

3. ACTION ON BOND. See Pleading, 6.

4. COLLECTING JUDGMENT AGAINST. See Practice, 9, 10.

HABEAS CORPUS.

See JUDGMENT, 14, 15; PARENT AND CHILD, 1.

HIGHWAYS.

1. DEDICATION AND PRESCRIPTION: EVIDENCE: INSTRUCTION. Where defendant claimed that the highway in question existed both by dedication and prescription, the court instructed that "knowledge in or notice to the owner of the use of the road as a public highway may be inferred from the use of the road by the public in such manner as that the owner, using his faculties as a reasonably prudent and observant person, having care for his property, would see or learn of such use." *Held* that this was not contrary to section 2061 of the Code, which provides that use of land shall not be evidence of adverse possession; because (1) the court did not state that such notice of use would be notice of an adverse claim; (2) other instructions given in the charge avoided any misunderstanding by the jury; and (3) the action was based upon an alleged dedication, as well as upon prescription, and said section relates to titles by prescription only. *Duncombe v. Powers*, 185.

2. ——: INSTRUCTION: EVIDENCE. An instruction as to the effect of the notorious and continued use of one's land for a highway, with knowledge on his part thereof, as bearing upon the title of the public therein, was objected to as not being warranted by the evidence; but *held* that the objection was not well taken. (See opinion for instruction and evidence). *Id.*

See BRIDGES.

HOMESTEAD.

1. CONVEYANCE: DEED TO SECURE MONEY ONLY. A deed of a homestead designed only to secure a loan from the grantee, the grantors continuing in possession, does not divest the grantors of their homestead rights. *McClure v. Braniff*, 88.

2. FORFEITURE BY USE FOR UNLAWFUL SALE OF INTOXICATING LIQUORS. Where a homestead owned by a husband is used by him for the unlawful sale of intoxicating liquors, it becomes liable for fines, costs and judgments rendered against him on account of such unlawful conduct; and, the title being in the husband, it makes no difference that such use of the homestead is without the consent and against the will of the wife. (See cases and statutes cited in opinion). *Id.*

3. TITLE IN HUSBAND: WIFE'S RIGHT TO PROTECT. In an action against a husband, who has the title to the homestead, to subject it to the payment of a judgment, the wife has such an existing interest as to entitle her to intervene for the protection of the homestead, regardless of whether her husband asserts the homestead right or not. (See cases cited in opinion). *Id.*

4. ABANDONMENT: EVIDENCE. Defendant obtained a judgment against plaintiff, while the latter was occupying certain property as a homestead. Plaintiff afterwards went away, taking his family with him, for the purpose, as he testified, of earning a living for himself and family, and with the continuing intention of returning. Some furniture was left in the house, and never removed by him. The premises were so rented that the lessee was a tenant at will. Plaintiff, at least once, named a price which he would take for the property. Defendant had the premises sold on execution to satisfy his judgment. In an action to set aside the sale, *held* that defendant had the burden to show that the homestead had been abandoned; and that the long duration of plaintiff's absence, while entitled to consideration, was not sufficient, under the circumstances, to establish that fact. *Boot v. Brewster*, 631.

5. TOWN PROPERTY: EXTENT: VALUE: EVIDENCE. In an action to set aside the unlawful execution sale of a homestead situated within a town plat, in which it appeared that it consisted of one acre of ground, *held* that the plaintiff had the burden to show that its value did not exceed five hundred dollars, in order to avoid the sale of the excess over one-half acre (Code, sec. 1996); but that his own testimony that he offered to take four hundred and fifty dollars for it was sufficient, in the absence of all other evidence as to its value. *Id.*

HUSBAND AND WIFE.

1. OWNERSHIP OF NOTE: EVIDENCE. A wife sought to foreclose a chattel mortgage securing a note. The defendant and intervening creditors of her husband claimed that the note belonged to the husband. Upon consideration of the evidence relating to the question as to whose money bought the note (see opinion), *held* that it was the property of the husband. *Gardner v. Connelly*, 205.

2. HUSBAND USING WIFE'S MONEY: FAILURE OF WIFE TO RECORD CLAIM UNDER REVISION: CREDITORS AFTER REPEAL. Where a wife let her husband have the use of her money while section 2500 of the Revision of 1860 was in force, but failed to record notice of her ownership of the same as required by said section, creditors of the husband, who became such after the repeal thereof, could not object to a mortgage given by him to his wife after such repeal to secure the money and interest. (*Jones v. Brandt*, 59 Iowa, 332, *followed*). *First Nat. Bk. of Nevada v. Fenn*, 222.

3. HUSBAND USING WIFE'S MONEY: NOTICE BY RECORD. Section 2499 of the Revision, providing that when a wife allows her husband to use her personal property she must place notice of her ownership on record in order to avoid surrendering her interest to her husband's creditors, has no reference to creditors who became such after the repeal of the statute by the enactment of the Code of 1873. (See *Jones v. Brandt*, 59 Iowa, 332). *Gilbert v. Glenny*, 513.

4. TITLE TO WIFE'S EARNINGS. The keeping of boarders by a married woman is such a business, independent of her duties as a wife, as entitles her to hold the proceeds of such business as her own. (See Code, sec. 2211, and *Mewhirter v. Hatten*, 42 Iowa, 288). *Id.*

5. ACTION FOR DIVORCE: HUSBAND'S LIABILITY FOR WIFE'S ATTORNEY FEES. (*Clyde v. Peavy*, 74 Iowa, 47, *followed*). *Eaton v. Peavy*, 740.

See AGENCY, 1; DIVORCE; FRAUD, 2; FRAUDULENT CONVEYANCE, 1, 8; HOMESTEAD, 8.

IMPRISONMENT.

See CRIMINAL LAW, 13.

INDICTMENT.

See CRIMINAL LAW, 1, 4, 7; INTOXICATING LIQUORS, 9, 11.

INFANTS.

See MINORS.

INFORMATION.

See CRIMINAL LAW, 7.

INJUNCTION.

1. OF LIQUOR NUISANCES. See Intoxicating Liquors, *passim*.

2. TO PREVENT WASTE. See Mortgages, 4.

3. TO PREVENT OBSTRUCTION OF STREAM. See Water and Watercourses, 2.

INNOCENT PURCHASER.

AT EXECUTION SALE: PROTECTION. A judgment creditor who purchases real estate at a sale under execution, in the absence of notice of an outstanding equity, is an innocent purchaser for value, and is entitled to protection as such. (See cases cited in opinion). *Ettenheimer v. Northgraves*, 28.

See FRAUDULENT CONVEYANCE, 7, 9; JUDICIAL SALE, 1; MORTGAGES, 7.

INSTRUCTIONS.

1. TO BE CONSTRUED TOGETHER: EXAMPLE. In an action upon an award, the agreement to submit to arbitration and the award of the arbitrators were admitted in the answer, and the court had distinctly instructed the jury to that effect. But, in introducing another instruction in regard to the real issues, the court said: "If you find from the evidence that the plaintiff and defendant agreed to submit their differences to arbitration, and if you find such award was made as agreed," etc. *Held* that the jury could not have understood that the execution of the agreement and the making of the award were in issue, and that they were to find thereon. *Amos v. Buck*, 651.

2. TO BE CONSTRUED IN LIGHT OF ISSUES AND EVIDENCE: EXAMPLE. In such action, the court instructed the jury to find for the defendant if they found that the award did not include all the differences in dispute between the parties at the time of the alleged award. *Held* not erroneous as not being limited to matters of dispute which were submitted to the arbitrators; because the pleadings and evidence showed that there were no other matters in issue, and the jury could not have been misled. *Id.*

3. SUBMITTING QUESTION OF WAIVER WITHOUT DEFINITION. In such action, the question as to whether defendant waived his right to be present at the hearing was submitted to the jury without defining what would constitute a waiver. *Held* no error, where the waiver, if any, was a direction of the defendant to the arbitrators to proceed in his absence. *Id.*

4. AS TO MATTER IN EVIDENCE BUT NOT IN ISSUE: ESTOPPEL. Where no estoppel is pleaded, the court is not required to submit such question to the jury, though there is evidence of facts which would constitute an estoppel. *Glenn v. Jeffrey*, 20.

5. NOT WARRANTED BY EVIDENCE: ERROR CURED. An instruction in this case directing the jury to find defendant guilty if they found from the evidence that he aided and abetted others in the commission of the crime charged, was erroneous, because there was no evidence that he so aided and abetted, but *held* that such error might be cured by other instructions given in the case, and that the error in this case was so cured. [SEEVERS, C. J., and REED, J., *dissenting*, both as to the rule and the application of it]. *State v. Pugsley*, 742.

6. NOT WARRANTED BY THE EVIDENCE. An instruction as to the legal effect of a fact of which there is no evidence is erroneous. *State v. Stone*, 215.

7. AS TO THEORY NOT RAISED. The court is under no obligation to instruct the jury in regard to a theory not raised by the pleadings, nor claimed to be true by either party, nor sustained by the testimoney of any witness. (See opinion for illustration). *George v. Swafford*, 491.

8. MATTER NOT IN ISSUE. The court is not required to instruct the jury as to a fact conceded by both parties, but on which neither claims anything. *Duncombe v. Powers*, 185.

9. NOT WARRANTED BY PLEADINGS: ERROR WITHOUT PREJUDICE. Plaintiff sought to recover upon a state of facts alleged in his petition. One of his witnesses, however, testified to another state of facts, and the court erroneously instructed the jury as if both states of fact were in issue; but the instructions were such that the verdict for defendant necessarily implied a finding against plaintiff on both states of fact. *Held* that the error was without prejudice, and no ground for reversal. *Newton v. Ritchie*, 91.

10. IMMATERIAL VARIANCE FROM ISSUES. The issue being whether the mortgage in question was given and received for the purpose of "hindering, delaying or *defrauding*" creditors, the court submitted to the jury the question whether it was made and received for the purpose of "hindering, delaying and *defeating*" creditors. *Held*, in view of the evidence and the charge of the court, that the variance was immaterial and without prejudice. *First Nat. Bank of Nevada v. Fenn*, 222.

11. STATING ISSUES. In stating plaintiff's claim to the jury the court omitted one of the issues raised in the petition. But since there was no evidence to sustain such issue, *held* that it was properly omitted. *Whalen v. Chicago, R. I. & P. Ry. Co.*, 563.

12. ERROR WITHOUT PREJUDICE. An instruction which erroneously excludes a claim on a contract is without prejudice where it appears that the contract was void. *King v. Mahaska County*, 329.

13. OMISSION CURED BY SPECIAL VERDICT. The omission of the court to submit to the jury a question which ought to have been submitted under the issues, is no ground for reversal on plaintiff's appeal, when the jury, by special verdict, found against them as to the only fact on which they could claim the submission of the question. *Carruthers v. McMurray*, 173.

14. CONFLICT: VERDICT: JUDGMENT NOT WARRANTED. In an action on a note given for borrowed money to plaintiff's husband, plaintiff alleged that she was the owner of the note. One of the defenses was that the note was executed on an usurious contract, and that plaintiff was neither the assignee nor owner of it. The eleventh instruction was to the effect that the plaintiff had the burden to show her ownership of the note. One paragraph of the fourteenth instruction was as follows: "If you find from the evidence that the note has not been paid, or settled and adjudicated, but that at the time of making said note, as a part of the contract thereof, usurious interest was agreed upon, then, after filling in the sum loaned, and date of said loan, your foreman should sign verdict number 2." In accordance with this instruction the jury returned the following verdict: "We, the jury, find that the amount loaned * * * was $70, and that said loan was made on the 7th day of June, 1877." *Held*—

   (1) That the fourteenth instruction was repugnant to the eleventh, in that the jury would understand therefrom, and did understand, that in case they found the facts as stated in the fourteenth instruction, they should find verdict No. 2 for plaintiff, without finding that she was the owner of the note.

(2) That because said verdict did not show a finding upon the issue as to the ownership of the note, nor a general or special finding for the plaintiff, it did not authorize a judgment for plaintiff for the amount loaned, and for the school fund for usury found by the court. *Pumphrey v. Walker*, 408.

15. REPETITION. There was no error in refusing instructions asked, when so much of them as was correct and material to the case was given by the court in its charge. *Van Horn v. Overman*, 421.

16. REPETITION NOT REQUIRED. It is not error to refuse an instruction asked when the same doctrine, in substance, is announced in the charge of the court. *State v. Pugsley*, 742.

17. REPETITION NOT REQUIRED. Where the court has fully and fairly charged the jury upon the issues, no prejudice results from a refusal to give a further instruction. *Hablichtel v. Yambert*, 539.

18. CONSPIRACY: FORM OF VERDICT. In an action based upon a conspiracy, where the evidence tended to establish the alleged conspiracy, the court properly instructed that the verdict should be either for or against both of the defendants. *Id.*

19. SPECIAL INTERROGATORIES. It was not error to refuse to submit special interrogatories when no answers which could have been made to them would have shown that the general verdict was wrong. *Van Horn v. Overman*, 421.

20. SPECIAL INTERROGATORIES: WHEN NOT PROPER. Under section 2808 of the Code, which provides that special interrogatories may be submitted to the jury, and that the jury may be required to find upon any particular questions of fact, such fact or facts must be material and pertinent to the matter in controversy, and the interrogatories must seek a response as to the existence of some particular fact, and not embrace a series of facts, which are necessarily included in and determined by the general verdict. (For illustration and application of rule, see opinion). *Whalen v. Chicago, R. I. & P. Ry. Co.*, 563.

21. SPECIAL INTERROGATORIES: REFUSED AS IMMATERIAL. There is no error in refusing to submit special interrogatories, when the answers, however given, could not affect the general verdict. *Hablichtel v. Yambert*, 539.

22. REVIEW OF INSTRUCTIONS ON APPEAL. See Practice in Supreme Court, 18, 21-25.

FOR INSTRUCTIONS ON PARTICULAR SUBJECTS, see appropriate titles.

INSURANCE.

(1) *Fire Insurance.*

1. POLICY ISSUED BY AGENT: REFORMATION IN EQUITY TO CONFORM TO CONTRACT. An agent of defendant, who had full authority to enter into contracts of insurance for his principal, issued the policy in question. The contract was for insurance on the property to the extent of three thousand dollars in several companies represented by the agent, and the policy in question was for a part of that sum. But the policy in question provided that it should be void if the insured should obtain additional insurance without the written consent of the company. In an action on the policy, wherein the additional insurance obtained under the contract was relied on as a defense, *held* that, because plaintiff relied on the agent to write the policy in accordance with the contract, and failed to read the policy to see if he had done so, he was not guilty of such negligence as to bar him of the right to have the policy reformed so as to express the real contract. *Barnes v. Hekla Fire Ins. Co.*, 11.

2. PROVISION AGAINST PRIOR INSURANCE: BREACH: WHAT IS. The insurance policy in question was taken by the plaintiffs jointly upon horses and mules which were sometimes kept in a barn owned by the plaintiff H. alone, and in which they were destroyed by the burning of the barn. The policy had the usual clause against prior insurance, and H. at the time held a policy on the barn and contents, in another company. *Held* that this was a breach of the condition against prior insurance on the mules and horses. *Horridge v. Dwelling-House Ins. Co.*, 374.

3. ——: ——: WAIVER: EVIDENCE ON APPEAL. The question whether there was a waiver of such breach by the agent who took the policy in suit having been found in plaintiff's favor by the jury on conflicting evidence, this court cannot interfere with such finding. *Id.*

4. ACTION ON POLICY: PLEADING: PROOFS OF LOSS: WAIVER. A petition in an action upon a policy of fire insurance, which shows that proofs of loss were not made within the time and in the manner required by the policy and by section 3, chapter 211, Laws of 1880, and which fails to state facts showing a waiver of such proofs, is bad on demurrer. *Von Genechtin v. Citizens' Ins. Co.*, 544.

5. ——: ——: PREMATURE ACTION. A petition in such case is bad on demurrer when it does not show the lapse of time required by the policy for the maturity of the claim, nor that required by the statute (sec. 3, chap. 211, Laws of 1880), before the action can be commenced. *Id.*

6. NOTICE AND PROOF OF LOSS: TIME OF GIVING: PLEADING. A petition in an action upon a policy of fire insurance stated that the loss occurred "on or about April 14, 1886," and that notice and proof of such loss were given "on or about June 19, 1886." *Held* that the petition did not show that more than sixty days intervened between the loss and the notice and proof thereof; but that, by the use of the words "on or about," it was indefinite as to that, and was not, therefore, bad on demurrer, under chapter 211, Laws of 1880. *Dist. Twp. of Sidney v. Des Moines Ins. Co.*, 647.

7. MUTUAL COMPANY: ESTOPPEL OF MEMBERS TO DENY ARTICLES OF INCORPORATION. A member of a mutual insurance company, in an action to recover upon a policy therein, where the defense is made that he has failed to comply with an amendment to the articles of incorporation, is not estopped from pleading that such amendment was never legally adopted and was not a part of the contract, unless it is shown that he knew of such amendment and contracted with reference thereto. *Day v. Mill-Owners' Mut. Fire Ins. Co.*, 694.

(2) *Life Insurance.*

8. ANCIENT ORDER OF UNITED WORKMEN: ADHERENCE TO BOTH LOYAL AND DISLOYAL LODGES: DOUBLE PAYMENT ON ONE CERTIFICATE. Prior to the schism in the Ancient Order of United Workmen in Iowa, plaintiff's husband was a member of Schiller Lodge, in that order, at Clinton, Iowa, and he continued to be a member of said lodge in good standing up to the time of the controversy between the Supreme Lodge of the United States and the Grand Lodge of Iowa. He never withdrew from Schiller Lodge, but continued to pay his dues and assessments to that lodge until the time of his death, and upon his death plaintiff presented his claim to said

lodge for payment, and it was paid in full, and her husband's certificate of membership was surrendered to that lodge, fully receipted. After said schism, however, plaintiff's husband adhered to what was known as the loyal grand lodge of Iowa, and assisted in organizing, and became a member of, Loyal Lodge, No. 237, at Clinton. The loyal lodge, so called, did not issue new certificates to such of their members as were in good standing in the disloyal lodge prior to the disruption, because it claimed to be the only legitimate lodge, and that the members in good standing before the disruption were *ipso facto* members in good standing in the loyal lodge, and that the certificates of membership already issued were certificates of membership in the only lodge known to the law. Plaintiff's husband paid his dues and assessments in the loyal lodge, also, up to the time of his death, and the loyal Grand Lodge of Iowa made and collected an assessment to pay the amount named in the certificate, but it refused to pay the same because plaintiff could not surrender the certificate, receipted, as required by the rules of the organization. Plaintiff's husband knew that the loyal lodge did not issue new certificates, and that he was, on account of his age, at the time of the organization of Loyal Lodge, No. 237, ineligible to membership as a new member. *Held* that plaintiff's husband had but one contract of insurance, and that she could not collect the amount thereof of the loyal lodge, after having surrendered the certificate to the disloyal lodge upon payment from it. *Bock v. Ancient Order of United Workmen*, 462.

9. PROVISION AGAINST SUICIDE: CONSTRUCTION. The life insurance policy declared on in this case provided that if the assured should commit suicide, "felonious or otherwise, sane or insane," the policy should be void. The assured did commit suicide while temporarily insane from illness, and when he was in no manner conscious or responsible. *Held* that no recovery could be had on the policy. (See opinion for authorities). *Scarth v. Security Mut. Life Soc.*, 346.

10. POLICY: CONSTRUCTION: FAILURE TO PAY ASSESSMENTS. A certificate of membership in the defendant company provided that it should be void in case the amount of any assessment was not paid within thirty days from the date of notice thereof. *Held* that, in the absence of any language in the contract, or in the articles of incorporation or by-laws of the defendant, qualifying the meaning of the word "void," it could not be construed as meaning "voidable at the election of defendant." *Bosworth v. Western Mut. Aid Soc.*, 582.

11. NON-PAYMENT OF ASSESSMENT: WAIVER: CUSTOM: EVIDENCE. In this case payment of the policy was resisted on the ground that the assessments had not been paid as therein required; and the court found that, though the defendant had sometimes accepted assessments after they were delinquent, it had no such general custom that the assured was justified in relying on it,—it appearing that he had no knowledge of such practice, except in a few instances in which his own assessments had been received after becoming delinquent. *Held* that such findings were not without support in the evience, and could not be disturbed. *Id.*

12. LIFE INSURANCE COMPANY: TAXATION OF MONEYS AND CREDITS: WHAT TO BE DEDUCTED AS INDEBTEDNESS. (*Equitable Life Ins. Co. v. Board of Equalization*, 74 Iowa, 178, *followed*). *Hawkeye Ins. Co. v. Board of Equalization of Des Moines*, 770.

INTEREST.

ORAL AGREEMENT FOR TEN PER CENT: VALIDITY AFTER EXECUTION. Section 2077 of the Code, providing that the rate of interest shall be six per cent., unless the parties in writing agree to a higher rate, does not prohibit an oral agreement for ten per cent.; and where there is such an oral agreement, and the amount of such interest is afterwards ascertained and a promissory note given therefor, it is binding upon the parties, and the creditors of the maker of the note cannot interfere. *First Nat. Bank of Nevada v. Fenn*, 221.

INTERVENTION.

1. NOT PERMITTED TO DELAY CAUSE. When a cause has been submitted to the court upon an agreed statement of facts, it is not error to deny a third party the privilege of intervening, when such intervention would raise new issues, and require a continuance of the main cause for the purpose of hearing testimony. *Teachout v. Des Moines B. G. St. Ry. Co.*, 722.

2. WHO IS NOT INTERVENOR. See Fraudulent Conveyance, 8.

See ATTACHMENT, 5; REPLEVIN, 4.

INTOXICATING LIQUORS.

1. NUISANCE: INJUNCTION: CONTEMPT: TITLE OF CAUSE: AFFIDAVIT BY ALIEN: APPEARANCE FOR STATE: EVIDENCE. At the suit of H. the plaintiff was enjoined from violating the prohibitory liquor law. In a subsequent proceeding, based on the affidavit of B. (who was at the time an alien), and entitled in the name of the state *versus* the plaintiff, he was adjudged guilty of contempt in violating the injunction. To B.'s affidavit, and as a part thereof, was attached a duly-authenticated copy of the writ of injunction and the service thereof. In the contempt proceeding, one C. at first appeared as counsel for the state, but before the hearing on the merits the county attorney appeared and prosecuted the cause for the state, and defendant was adjudged guilty of contempt. *Held*—

(1) That the contempt proceeding was properly brought in the name of the state, instead of in the name of the plaintiff in the injunction suit,—it being a proceeding criminal in its nature, and only incidental to the original cause.

(2) That, whether C. had a right to appear for the state or not, the appearance of the county attorney gave the court full jurisdiction to proceed with the complaint.

(3) That B., though an alien, was competent to make the affidavit as the basis of the proceeding.

(4) That it was not necessary to introduce in evidence the original writ of injunction and service thereof, since authenticated copies were before the court, attached to the affidavit. *Fisher v. Cass County District Court*, 232.

2. NUISANCE: TEMPORARY INJUNCTION WITHOUT NOTICE: PERMANENT INJUNCTION ON HEARING: APPEAL. Where on the final hearing the district court perpetually enjoins a saloon nuisance, and an appeal is taken from that decree, it will not be reversed for an error in granting a temporary injunction without notice to the defendants. (*Hughes v. Eckerson*, 55 Iowa, 641, *distinguished*). *State v. Douglass*, 432.

——— : ——— : ACTION IN NAME OF STATE : ATTORNEY'S FEE. Under section 1, chapter 66, Laws of 1894, attorney's fees are taxable against the unsuccessful defendant in all cases brought to abate liquor nuisances, whether prosecuted in the name of the state by the county attorney, or in the name of a citizen of the county. *Id.*

——— : ——— : EVIDENCE AGAINST LESSORS OF BUILDING. In an action to enjoin the use of leased premises as a liquor nuisance, the nuisance was proved, and it appeared that the lessors knew that the building was fitted up with a bar and other appliances for the sale of drinks. *Held* that this was sufficient to justify a decree against them, in the absence of a showing that they in good faith leased the premises for lawful purposes. *Id.*

NUISANCE: INJUNCTION: CONSTRUCTION OF PLAINTIFF. A Methodist clergyman, who resides in a county in this state for the purpose of preaching there for one year under appointment of the bishop of his church, but subject to removal at any time by order of the bishop, is a citizen of the county within the meaning of the statute authorizing any citizen of the county to maintain an action for the abatement of a liquor nuisance. *Fuller v. McDonnell*, 220.

NUISANCE: INJUNCTION: PRIOR VOLUNTARY ABATEMENT. Where premises were used for the unlawful sale of intoxicating liquors with the knowledge of the lessor's agent, but without such knowledge on the part of the lessor who was a non-resident of the state, and the agent, upon learning of such unlawful use, in good faith caused the unlawful sale to be stopped and the premises surrendered to the lessor, who thereafter used only for lawful purposes, held that it was error to perpetually enjoin the lessor from maintaining the nuisance on the premises, and to render judgment against it for costs, though the action was begun while the nuisance existed. *Scott v. Davis*, 282.

NUISANCE: INJUNCTION: PRIOR CESSATION. Where the illegal sale of liquors had been continued for years, but the clerk, upon whose testimony chiefly the state relied to establish the nuisance, had been discharged a short time before the action was commenced, and no sales of liquor were shown to have been made on the premises during that time, *held* that the action was defeated on the ground that no nuisance existed when the action was commenced, especially as there was evidence tending to show that the sales by defendant himself after the discharge of the clerk [illegible] opinion. *Id.* Commissioners' opinion, in cases followed and distinguished. *Edwards v. Foster*, 253.

NUISANCE: INJUNCTION AFTER VOLUNTARY ABATEMENT: GOOD FAITH. An injunction to abate and enjoin a liquor nuisance was begun May 3, 1888. The cause was not tried until February 3, 1888. Defendant was maintaining the nuisance when the action was begun, and continued to do so until four days before the trial. *Held* that recent reformation was no ground for refusing, upon the merits, a perpetual injunction of the nuisance, and such other orders as would effectually abate it. (*Judge v. Kirk*, 71 Iowa, 544, followed.) *Hayman v. Dunner*, 312.

NUISANCE: INDICTMENT: A [illegible] OF VENUE. The indictment in this case charges the keeping of a certain nuisance, on the first day of May [illegible], and on divers other days and times between said first day of May [illegible] and the finding of the indictment. It then states that [illegible] nuisance [illegible] situated in a certain described land in [illegible] county, and that it charges that the nuisance [illegible] was in Franklin county [illegible]

10. ——— : INSTRUCTION : SALE OF BEER PRIOR TO JULY 4, 1884. Prior to July 4, 1884, the sale of beer was not unlawful, and instructions which authorized the finding of defendant guilty of a nuisance in keeping a place for the sale of beer prior to that time were erroneous. *Id.*

11. NUISANCE : INDICTMENT. The indictment in this case charged that defendant did unlawfully establish, keep, use and maintain a certain building and place in which he owned and kept intoxicating liquors, to-wit : * * * with intent to sell and give the same away contrary to and in violation of the laws of Iowa, and did at the aforesaid times and place so unlawfully sell and give away such intoxicating liquors. *Held* that this sufficiently charged the *keeping of the place* in which the forbidden acts were done, and therefore was a good indictment for nuisance. [REED, J., not concurring.] *State v. Price*, 243.

12. ——— : INSTRUCTION : ERROR WITHOUT PREJUDICE. The court instructed the jury that "any person who, without a permit, sells intoxicating liquors in a building or place, or keeps intoxicating liquors in such place with intent to sell the same, is guilty of a nuisance." *Held* inaccurate, because the crime of nuisance consists in *keeping the place* where the liquors are unlawfully kept and sold, and not in the unlawful keeping and selling of the liquors; but that it was without prejudice, because, in view of the evidence and the other instructions, the jury could not have been misled by it. *Id.*

13. ——— : ——— : PARTIAL STATEMENT OF LAW. An instruction given in this case did not correctly state the law as applied to the main issue in the case, but it was given to warn the jury against a misapprehension which was likely to arise from a claim urged by defendant on the trial, and it was well adapted to that purpose. *Held* that, since the jury could not have misunderstood its special purpose, and could not have been misled by it, it was no ground for complaint on appeal. *Id.*

14. ——— : PHARMACIST : EXCESSIVE FINE. In this case a registered pharmacist with a permit to sell intoxicating liquors was found guilty of a nuisance, and was fined four hundred dollars. He now insists that this fine is excessive, on the ground that his violation of the law was committed solely through a mistake as to its meaning. But it appearing from the record that the court below was warranted in finding that the defendant had violated the spirit as well as the letter of the law, *held* that the fine was not excessive. *Id.*

15. UNLAWFUL SALE : LIEN ON REAL ESTATE : SALE AFTER ACTION BEGUN : NOTICE : PRIORITY. Where one takes a deed or mortgage upon real estate after an action has been begun against the owner for the unlawful sale of liquors on the premises, a judgment in which action would be a lien on the real estate under section 1558 of the Code, the grantee or mortgagee takes subject to the lien of any such judgment afterwards rendered. (*O'Brien v. Putney*, 55 Iowa, 292, *followed*, and *Bonesteel v. Downs*, 73 Iowa, 685, *distinguished*). *McClure v. Braniff*, 38.

16. NUISANCE : DUTY OF COURT TO ORDER ABATEMENT. In an action to restrain and abate a liquor nuisance, where a nuisance is found and enjoined, it is error for the court to refuse an order for its abatement. (See statutes and cases cited in opinion). *Id.*

3. ——— : INJUNCTION : ACTION IN NAME OF STATE : ATTORNEY'S FEE. Under section 1, chapter 66, Laws of 1886, attorney's fees are taxable against the unsuccessful defendant in all cases brought to enjoin liquor nuisances, whether prosecuted in the name of the state by the county attorney, or in the name of a citizen of the county. *Id.*

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5. NUISANCE : INJUNCTION : CITIZENSHIP OF PLAINTIFF. A Methodist clergyman, who resides in a county in this state for the purpose of preaching there for one year under appointment of the bishop of his church, but subject to removal at any time by order of the bishop, is a citizen of the county within the meaning of the statute authorizing any citizen of the county to maintain an action for the abatement of a liquor nuisance. *Fuller v. McDonnell*, 220.

6. NUISANCE: INJUNCTION: PRIOR VOLUNTARY ABATEMENT. Where leased premises were used for the unlawful sale of intoxicating liquors, with the knowledge of the lessor's agent, but without such knowledge by the lessor, who was a non resident of the state, and the lessor, upon learning of such unlawful use, in good faith caused the unlawful sales to be stopped, and the premises surrendered, and they were thereafter used only for lawful purposes, *held* that it was error to perpetually enjoin the lessor from maintaining the nuisance on the premises, and to render judgment against it for costs, though the action was begun while the nuisance still existed. (See opinion for cases followed and distinguished). *Eckert v. David*, 302.

7. NUISANCE: INJUNCTION: PRIOR CESSATION. Where the illegal sales of liquors had been continued for years, but the clerk, whom the defendant claimed was alone guilty, had been discharged a few weeks before a suit to enjoin the nuisance was begun, and no other change in the business was shown, *held* that the action could not be defeated on the ground that no nuisance existed when the action was commenced, especially as there was evidence tending to show illegal sales by defendant himself after the discharge of the clerk. (See opinion for cases followed and distinguished). *Elwood v. Price*, 228.

8. INJUNCTION AFTER VOLUNTARY ABATEMENT: GOOD FAITH. An injunction to abate and enjoin a liquor nuisance was begun May 19, 1886. The cause was not tried until February 3, 1888. Defendant was maintaining the nuisance when the action was begun, and continued to do so until four days before the trial. *Held* that such recent reformation was no ground for refusing, upon the hearing, a perpetual injunction of the nuisance, and such other orders as would effectually abate it. (*Judge v. Kribs*, 71 Iowa, 183, and *Danner v. Hotz*, 74 Iowa, 389, *followed*). *Halfman v. Spreen*, 309.

9. NUISANCE : INDICTMENT : AVERMENT OF COUNTY. The indictment in this case charges the keeping of a certain building as a nuisance, "on the first day of May, 1886, and on divers other days or times between said first day of May, 1886, and the finding of this indictment." It then states that "said building * * * *is* situated on (certain described land) in Franklin county, Iowa." *Held* that it sufficiently charges that the building in which the offense was committed *was* in Franklin county. *State v. Jacobs*, 247.

10. ——— : INSTRUCTION : SALE OF BEER PRIOR TO JULY 4, 1884. Prior to July 4, 1884, the sale of beer was not unlawful, and instructions which authorized the finding of defendant guilty of a nuisance in keeping a place for the sale of beer prior to that time were erroneous. *Id.*

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14. ——— : PHARMACIST : EXCESSIVE FINE. In this case a registered pharmacist with a permit to sell intoxicating liquors was found guilty of a nuisance, and was fined four hundred dollars. He now insists that this fine is excessive, on the ground that his violation of the law was committed solely through a mistake as to its meaning. But it appearing from the record that the court below was warranted in finding that the defendant had violated the spirit as well as the letter of the law, *held* that the fine was not excessive. *Id.*

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16. NUISANCE : DUTY OF COURT TO ORDER ABATEMENT. In an action to restrain and abate a liquor nuisance, where a nuisance is found and enjoined, it is error for the court to refuse an order for its abatement. (See statutes and cases cited in opinion). *Id.*

17. ILLEGAL SALE BY AGENT: LIABILITY IN ACTION TO RECOVER PURCHASE PRICE. An agent who sells intoxicating liquors in violation of law, but who does not receive the purchase money, is not liable, under section 1550 of the Code, in an action by the purchaser to recover the purchase money. Section 1540 of the Code does not have the effect to make him liable. *Schober v. Rosenfield*, 455.

18. ILLEGAL SALE: RECOVERY OF PURCHASE PRICE: DEMAND. An action cannot be maintained, under section 1550 of the Code, to recover the purchase price of intoxicating liquors unlawfully sold, without first making demand for the repayment of the money. *Id.*

19. ILLEGAL SALES BY REGISTERED PHARMACIST: KNOWLEDGE: EVIDENCE. The evidence in this case considered (see opinion), and *held* to show that the defendant, a registered pharmacist, not only made illegal sales of intoxicating liquors himself, but that he must, as a reasonably intelligent man, have known of such illegal sales made by his clerk, notwithstanding his claim to the contrary. *Elwood v. Price*, 228.

20. ILLEGAL SALES BY PHARMACISTS UNDER PERMIT: SEARCH-WARRANT. A pharmacist who has a permit to sell intoxicating liquors, but who sells them for purposes other than the legitimate and actual necessities of medicine, is subject to the utmost rigors of the laws relating to the unlawful sales of such liquors (chap. 88, Laws of 1886), and his liquors may be seized under a search-warrant, as provided by section 1544 of the Code. *State v. Ward*, 637.

21. SEARCH-WARRANT: SEIZURE BEFORE RECEIPT OF WARRANT: LEGALITY OF SUBSEQUENT PROCEEDINGS. An officer seized certain intoxicating liquors before any warrant therefor came into his hands, but he afterwards received a warrant which would have justified the seizure, and under it the liquors were retained, and, upon further proceedings, the owner appeared and defended, but the liquors were condemned. *Held* that, while the officer may have been guilty of a trespass in the first instance, that fact did not affect his right to hold the liquors after he received the warrant, nor the right of the court to proceed in all respects as if no trespass had been committed. *Id.*

22. ———: LIQUORS NOT IN DEFENDANT'S CUSTODY. It is no valid objection to the seizure and condemnation of liquors under a search-warrant, that they are not, when seized, in the custody of the person who afterwards appears and claims to be their owner, even though he be a registered pharmacist with a permit to sell such liquors. *Id.*

23. PHARMACIST WITH PERMIT: SEARCH-WARRANT PROCEEDINGS: RIGHT OF STATE TO APPEAL. Where the intoxicating liquors of a pharmacist holding a permit to sell were seized under a search-warrant, and it was proved (upon an appeal to the district court) that he made sales of such liquors to persons in the habit of becoming intoxicated, and the court instructed the jury, upon such proof, to find a verdict for the defendant, *held* that such instruction was erroneous, as matter of law, and that the state had a right to appeal to this court, under section 4539 of the Code, for the purpose of obtaining a "correct exposition of the law." *Id.*

24. ———: UNLAWFUL SALES: GUILTY KNOWLEDGE. A pharmacist with a permit to sell intoxicating liquors cannot escape liability for selling to a person in the habit of becoming intoxicated, on the ground that he was ignorant of such habit. (Compare *Dudley v. Sautbine*, 49 Iowa, 650; Code, sec. 1539; Laws of 1886, chap. 88). *Id.*

25. INFORMATION FOR SELLING: PLEA OF FORMER CONVICTION FOR NUISANCE. (*State v. Graham*, 73 Iowa, 553, *followed*). *State v. Brown*, 768.

26. NUISANCE: INJUNCTION: CONTEMPT: PUNISHMENT. See Contempt, 1, 2.

27. SALE OF IN HOMESTEAD: FORFEITURE. See Homestead, 2.

JUDGES.

1. UNCLE OF PLAINTIFF: DISQUALIFICATION: WAIVER. Plaintiff brought his action for an injunction in the district court, one of the judges of which was his uncle, but he procured his temporary injunction from one of the other judges of the district. He then let his case lie for nearly two years, when the defendant brought it on for trial at a term when plaintiff's uncle was presiding over the court in that county. The plaintiff then moved to have the cause set down for trial on depositions and documentary evidence, which motion was overruled. He then moved for a continuance till the next term, and in his affidavit in support of his motion stated that the presiding judge was his uncle, and therefore prohibited from trying the case. This motion was also overruled. Plaintiff then moved for a change of forum, on the ground that the presiding judge was prejudiced against him, but he did not present the relationship of the judge as a reason for such change, nor did he at any time specifically call the court's attention to section 190 of the Code, under which he now insists that the judge was disqualified; the only reference to that matter being in his affidavit for a continuance. The motion for a change of forum was also overruled, and upon a trial before the court judgment was rendered for the defendant, from which plaintiff appeals. *Held* that the judge, being related to the plaintiff in the third degree according to the civil law (2 Bl. Comm. 207; 2 Kent, Comm. 412), was, under section 190 of the Code, disqualified from the first to try the cause without the mutual consent of the parties, and that nothing done or omitted by plaintiff amounted to such consent on his part. *Chase v. Weston*, 159.

2. ——: ——: TRIAL DE NOVO ON APPEAL. As plaintiff in such case was entitled to a trial before a court of original jurisdiction, and as the trial below was *coram non judice*, and as this court has only appellate jurisdiction, *held* that a trial *de novo* could not be had in this court, but that the cause must be remanded for trial before a competent judge. (*County of Floyd v. Cheney*, 57 Iowa, 102, *distinguished*). *Id.*

JUDGMENT.

1. JURISDICTION: SERVICE OF NOTICE: EVIDENCE TO OVERCOME OFFICER'S RETURN. The return of an officer showing the service of an original notice, even though not regarded as conclusive, should be deemed strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof. And in this case, where the retnrn was supported by the positive testimony of the officer who made it, but was denied by the parties served and others, all of whom testified from memory only, after the lapse of three years, but their testimony was contradicted as to incidental facts, while that of the officer was corroborated by evidence that the notice was handed to him for service on the morning of the day when he claimed to have served the same, *held* that the evidence was insufficient to set aside a judgment rendered on the return. *Wyland v. Frost*, 209.

2. LIEN ON EQUITY IN LAND. A judgment is a lien upon the equitable interest in real estate owned by the defendant at the time of its rendition, or subsequently acquired. (Code, sec. 2882). Accordingly, *held* that a judgment against defendant was a lien on real estate which he subsequently acquired and took possession of under a contract of purchase, though it had not been conveyed to him. *Rand v. Garner*, 311.

3. IN JUSTICE'S COURT: TRANSCRIPT: DURATION OF LIEN. A judgment rendered in a justice's court, a transcript of which is filed in the district court, becomes a lien on real estate for ten years from the filing of the transcript, and not from the date of the judgment only. (See Code, sec. 3568, and *McCoy v. Cox*, 54 Iowa, 595). *Id.*

4. IN ACTION AT LAW: SETTING ASIDE IN EQUITY. Judgments in actions at law cannot be annulled or modified in equity except for causes arising or discovered subsequent to their rendition. (Code, sec. 2522). And so, where plaintiff brought an action on account against defendant, but, pending the trial, elected to dismiss it, but the clerk by mistake entered a general judgment against him, and he had no knowledge of such mistake until the judgment so entered was pleaded as a bar to a second action on the same account, and such defense was held good, and judgment was therefore rendered against him in the second action, *held* that a court of equity could not pronounce the last judgment a nullity, but that it must be regarded as a final adjudication of the claim. *Lowery v. Greene County*, 338.

5. IN VACATION UNDER STIPULATION: VALIDITY. An agreement of all the parties to eighteen like cases, the plaintiff in each being the same, was filed in the court where all but one of them was pending, and that one had been removed to another county for trial. The effect of the agreement was that the trial of the one case should be conclusive of all the cases, and that when either party should file a certified copy of the judgment in that case, the judge should order and the clerk should enter a like judgment in each of the other cases. *Held* that this was a stipulation for judgment in vacation, and that judgments entered in vacation pursuant to the agreement were valid. *Western Land Co. v. English*, 507.

6. PARTY DEFENDANT: EVIDENCE. While the omission to enter the name of a party defendant in the appearance docket, in entering the suit therein, as required by section 198 of the Code, raises a presumption that such party was not named as a defendant in the petition, such presumption is overcome by the decree in the case, which recites that such party was a defendant. *Toliver v. Morgan*, 619.

7. JURISDICTION: ENTRY OF PETITION IN APPEARANCE DOCKET. The failure of the clerk, in entering a suit in the appearance docket, as required by section 198 of the Code, to enter the name of one of the defendants therein, does not, under section 200 of the Code, amount to a failure to file a petition as against him, and does not affect the jurisdiction of the court to render a judgment against him. *Id.*

8. ———: SERVICE OF NOTICE: FINDING OF COURT: CONSTRUCTION OF DECREE. The court, in the decree of foreclosure, expressly found that the "foregoing defendants" had been duly served with notice. B. was not named as a defendant in the caption, nor in any part of the decree preceding the quoted words. But in the caption the abbreviation "*et al.*" was used to indicate that there were other defendants than the one named. *Held* that this was to be understood as meaning the other defendants named in the petition; and that this, together with the fact that B. was named later in the decree as a defendant, and the decree purported to bar him, was sufficient to show that the court found that he had been served with notice. *Id.*

9. ——: ——: CONCLUSIVENESS OF DECREE. Where the fact of service of notice appears from the decree, it is shown by the record, if there is nothing in any other part of the record showing otherwise. *Id.*

10. LIEN AFTER CANCELLATION. Where notes are taken for the amount of a judgment, and the judgment cancelled, there is no longer any judgment, nor any lien on real estate by virtue thereof. *Polk County v. Nelson*, 648.

11. ——: DURATION OF. A judgment ceases to be a lien on real estate after ten years from the date of its rendition. (Code, sec. 2882). *Id.*

12. BY DEFAULT: SETTING ASIDE: TERMS: APPLICATION OF RULE. Before a defendant against whom a judgment upon default has been entered is entitled to have it set aside he must show by affidavit (1) a meritorious defense to plaintiff's claim, or some portion of it; and (2) a reasonable excuse for having made the default. But where the court, upon hearing the motion to set aside the judgment, required the plaintiff to remit a portion of it, and, upon that being done, overruled the motion, *held* that such order implied a finding of facts showing a sufficient excuse for the default; for otherwise defendant would not have been entitled to any relief; also that the granting of such partial relief implied a finding, as matter of law, that defendant had shown a meritorious defense as to a part of plaintiff's claim. And it appearing from the record that such finding of law was correct, and the finding of fact being presumed to be justified by the evidence. *held*, further, that the order overruling the motion was erroneous, because inconsistent with these implied findings of the court. [SEEVERS, J., *dissenting*]. *Joerns v. La Nicca*, 705.

13. SHOWING OF MERITS: EVIDENCE. Upon the hearing of a motion to set aside a judgment by default, no evidence can be received as to the merits of the defense shown, except the affidavits filed in support of the motion. If that showing is sufficient in law, it must be accepted for the purposes of the motion. Whether it is true in fact must be determined upon a new trial, if one is granted. *Id.*

14. OF IMPRISONMENT: ATTACK BY HABEAS CORPUS. An attack by *habeas corpus* upon the validity of a judgment of imprisonment is of a collateral character, and, unless the judgment is void, no relief can be obtained in such inquiry. (See opinion for citations). *Turney v. Barr*, 758.

15. ——: GROSS IRREGULARITIES NOT AVOIDING: REMEDY: HABEAS CORPUS. The defendant in a criminal case was indicted for grand larceny. He was arraigned, and personally pleaded not guilty, and a jury was impaneled and sworn to try and determine the issue thus raised. But he was in the custody of the sheriff, and was not present when the jury was impaneled and sworn, nor during the trial, nor when the judgment of imprisonment was rendered against him upon a verdict of guilty. Moreover, the verdict was not the result of the deliberation of the jury, but was prepared by the court and signed by one of the jurors as foreman under the direction of the court, and no opportunity was given to the jurors to assent thereto or dissent therefrom; and no evidence was introduced, except the minutes of the evidence before the grand jury, which were reduced to writing by the clerk, and returned with the indictment. *Held* that these were gross irregularities, but that the court had jurisdiction of the defendant and of the subject-matter, and therefore the judgment was not void; and that the remedy was by motion for a new trial in the district court, and if not granted, by appeal, and that the errors could not be reviewed and relief granted upon *habeas corpus* proceedings against the warden of the penitentiary who had him in custody under the judgment. [REED, J., *dissenting*.] *Id.*

16. ACTION ON: WHAT IS NOT. See Practice, 10.

17. DECREE IN ACTION TO QUIET TITLE. See Tax Sale and Deed, 8.

See GARNISHMENT, 1; REPLEVIN, 8; FORMER ADJUDICATION, 1.

JUDICIAL SALE.

1. ACTION TO SET ASIDE: PLEADING. A petition to set aside an execution sale of land alleged simply that the defendant purchased the property at the sale and obtained a deed to it, and had actual and constructive notice at the time of the rights of plaintiff. *Held* that this was equivalent to saying that she had paid the amount of her bid; and that plaintiff could not be heard to claim, on appeal, that the testimony showed that she had not so paid, and was not a *bona-fide* purchaser. *May v. Sturdivant*, 116.

2. UNDER JUNIOR AND SENIOR LIENS: RIGHT TO RENTS DURING YEAR FOR REDEMPTION. Plaintiff was the mortgagee of leased premises, and she had foreclosed her mortgage and bought the premises at foreclosure sale, but the year for redemption had not expired. She also had an assignment from the mortgagor of all rents due or to become due. Defendant had bought in the property at the earlier judicial sale upon a junior judgment, and had received a sheriff's deed. *Held* that defendant was entitled to the rents from the date of his deed up to the time when plaintiff should obtain a deed upon her foreclosure sale. *Patton v. Varga*, 368.

JURISDICTION.

1. OF FOREIGN CORPORATION: ACTION AIDED BY ATTACHMENT: FORMER ADJUDICATION. Under section 2580 of the Code, an action against a foreign corporation may be maintained in the courts of this state when it is aided by attachment against the property of such corporation found within this state; and a judgment of a federal court in this state, dismissing a former action based on the same cause, but not aided by attachment, on the ground that it had no jurisdiction of the defendant, is no bar to the subsequent action aided by attachment. *Weyand v. Atchison, T. & S. F. Ry. Co.*, 578.

2. ON CHANGE OF VENUE. See Venue, 2.

See APPEALS, 6; JUDGMENT, 1, 7-9; JUSTICES AND THEIR COURTS, 1.

JURY TRIAL.

RIGHT TO. See Reference, 1.

JUSTICES AND THEIR COURTS.

JURISDICTION: AMOUNT. Where a petition in justice's court claimed that there was due plaintiff from defendant $124.83, but demanded judgment for only $99, the latter sum was the amount in controversy, and hence the court had jurisdiction of the amount. *McVey v. Johnson*, 165.

See APPEALS, 6, 7; JUDGMENT, 3.

LAND.

See REAL ESTATE: PUBLIC LANDS.

LANDLORD AND TENANT.

See ASSAULT AND BATTERY, 3-5; REAL ESTATE, 3; FORCIBLE ENTRY AND DETAINER, 1, 2; MINES AND MINING, 2.

LEASE.

1. CONSTRUCTION OF FARM LEASE. See Forcible Entry and Detainer, 2.

2. EFFECT OF PART PERFORMANCE. See Statute of Frauds, 1.

See MINES AND MINING, 1, 2.

LEVY.

See ATTACHMENT, 1; CHATTEL MORTGAGES, 2, 5,

LIEN.

1. NOT OBTAINED BY GARNISHMENT. See Garnishment, 5.

2. OF JUDGMENT. See Judgment, 2, 3, 10, 11.

3. BY LEVY. See Attachment, 1, 2, 4.

See PRIORITY OF RIGHTS.

LIFE INSURANCE.

See INSURANCE, 8-12.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

LIS PENDENS.

See FRAUDULENT CONVEYANCE, 8.

MALICIOUS PROSECUTION.

1. EVIDENCE. In an action for malicious prosecution, the plaintiff offered in evidence an affidavit made by the defendant, and filed in the prosecution complained of, to the effect that the sheriff was partial to the defendant in that case, and prejudiced against the prosecution. *Held* that it was properly excluded as being irrelevant. *Donnelly v. Burkett*, 613.

2. ———. In such case certain records in the prosecution were properly excluded, when offered by plaintiff, because all the facts intended to be proved thereby were admitted by defendant's answer. *Id.*

3. ———: APPEAL. In such case, the exclusion of a question asked the short-hand reporter as to what a witness testified to on the prosecution cannot be reviewed on appeal, where there is nothing to show what fact was intended to be elicited. *Id.*

4. ———: STATEMENTS TO COUNSEL. In such case one of defendants testified to statements he made to counsel before the prosecution was begun, and then, in response to a question, he testified that he did not withhold any fact in making the statement. *Held* that such testimony was properly admitted. *Id.*

5. ———: NEWSPAPER STATEMENTS: OBJECTION TO: ESTOPPEL. Where plaintiff, in such case, offered parts of a newspaper statement in evidence, he could not be heard to object to the defendant's offering omitted portions of the same statement, on the ground of incompetency. *Id.*

6. PROBABLE CAUSE: INSTRUCTION: GROUPING FACTS. In such case the court instructed the jury that if defendants honestly thought the plaintiff guilty of the crime with which they had charged him, and that belief was based upon a knowledge of facts and circumstances tending to show guilt, which were sufficient to induce an ordinarily reasonable and cautious man to believe plaintiff guilty, the jury should find probable cause. *Held* correct and sufficient, without enumerating and specifying the facts which would induce such belief of guilt. (*Johnson v. Miller*, 63 Iowa, 529, *distinguished*). *Id.*

MANDAMUS.

See COUNTY TREASURER, 1.

MASTER AND SERVANT.

1. NEGLIGENCE OF VICE-PRINCIPAL: LIABILITY. One who has charge of the timber-yard of a railroad company, and employs and discharges men, is a vice-principal: and one who takes his place when absent is a temporary vice-principal; and for the negligence of such persons, resulting in personal injury to a subordinate employe, the company is liable. *Baldwin v. St. Louis, K. & N. W. Ry. Co.*, 297.

2. NEGLIGENCE: NOTICE TO VICE-PRINCIPAL. In such case, notice to the temporary vice-principal, when he was acting as such, of the defective piling of timbers which caused the injury, was notice to the company, regardless of the question whether or not he had any duty to perform in the piling of the timbers, or in connection with the piles. *Id.*

See RAILROADS, 24–34.

MINES AND MINING.

1. MINING LEASE: CONSTRUCTION: IMPLIED RESERVATION OF SURFACE OWNER'S RIGHTS. A mining lease made by defendants granted to plaintiffs the right to mine "all the coal" under certain described premises. Over the premises so leased a railroad had been constructed, and was being operated at the time the lease was executed, and the company afterwards enjoined plaintiffs from mining the coal under its right of way, and plaintiffs now seek to recover of defendants the damages sustained by reason of the injunction. But *held* that no recovery could be had, because the mining estate was servient to the surface estate, and the lessees took the lease with an implied covenant that they would so conduct their mining operations as not to damage the surface or dominant estate by undermining it. *Mickle v. Douglas*, 78.

2. ——: ——: RIGHT TO REMOVE BUILDINGS AFTER FORFEITURE. A mining lease made by defendants to plaintiffs provided that if the lessees failed to pay the stipulated royalty within thirty days after the same became due, and perform the other conditions of the lease, the same, and all rights thereunder, should be forfeited, and the lessors might take possession of the mine and all property connected therewith. It also provided that upon the termination of the lease the lessees might remove all new buildings placed on the premises by them, unless all right thereto had been forfeited by a forfeiture of the lease. *Held* that the right to remove the buildings within a reasonable time after the lease was terminated by a forfeiture for the non-payment of the royalty was not lost by the forfeiture of the lease; because forfeitures are not favored by the law, and will not be construed to embrace property not clearly within the meaning of the language providing for the forfeiture. *Id.*

MINORS.

See STATUTE OF LIMITATIONS, 4.

MISTAKE OF LAW.

See CRIMINAL LAW, 8.

MONOPOLIES.

See CITIES AND TOWNS, 1.

MORTGAGES.

1. RIGHT OF WAY OVER PREMISES: WHO ENTITLED TO DAMAGES. Where the mortgage debt remains unpaid, and the land is not sufficient to pay it, and the mortgagor is insolvent, the mortgagee has, as against the mortgagor, a lien on the damages awarded for right of way over the premises. (See *Sawyer v. Landers*, 56 Iowa, 422). And in such case, where the mortgagee assigned his mortgage, but reserved his right to the damages, and the mortgagor assigned his equity in the land, and the mortgage was foreclosed and the land exhausted, leaving a balance of the judgment unpaid, which balance was then assigned to the mortgagee, *held* that he was still entitled to the damages as against all parties, to be applied on the unpaid portion of the judgment. *Schafer v. Schafer*, 349.

2. SALE UNDER JUNIOR MORTGAGE: PURCHASE BY MORTGAGEE: AMOUNT BID. When a junior mortgagee buys in the premises under a foreclosure of his mortgage for less than the amount of his judgment, the unsatisfied portion of the judgment ceases to be a lien on the property, but he is not bound to see that the property sells for enough to satisfy the prior liens; and he may afterwards take an assignment of the senior mortgage and foreclose it, and sell the land thereunder. *Herrick v. Tallman*, 441.

3. FORECLOSURE: JUNIOR MORTGAGEE NOT MADE PARTY: SUBSEQUENT FORECLOSURE AS TO HIM: DECREE: REDEMPTION. The holder of a senior mortgage foreclosed and bought in the land, but failed to make the junior mortgagee a party. Subsequently he brought an action against the junior mortgagee to foreclose his equity of redemption, and a decree was entered, upon a default, for the relief sought, without allowing any time within which redemption might be made. *Held* that, if this was error, it did not avoid the decree; and that, so long as it stood uncorrected, the junior mortgagee could not redeem the land. *Evans v. Atkins*, 448.

4. WASTE: INJUNCTION. This action was brought to enjoin the cutting of timber on mortgaged premises, and a temporary injunction was allowed, but the final hearing was not had until after the premises had been bid in by the mortgagee, at foreclosure sale, for the full amount of his demand and costs; but the year for redemption had not expired. The injunction was dissolved and the petition dismissed. *Held* that this was right, because there was no ground for the action in the first place; it appearing that defendants had then ceased cutting timber, with no apparent intention of resuming; and that the cutting already done had been done under an agreement with plaintiff, which provided for the payment of the proceeds upon the mortgage debt, no intention to violate which agreement was shown; and the fact, which appeared at the final hearing, that they did not so apply the proceeds of the timber, was then immaterial, since plaintiff bought in the premises for the full amount of the debt and costs. *Ellison v. Smyth*, 570.

5. FORECLOSURE BEGUN: PAYMENT TO ATTORNEY BY JUNIOR MORTGAGEE: AUTHORITY OF ATTORNEY: SUBROGATION. C., an attorney, had authority from K. to foreclose mortgages in Iowa for him at his discretion. In the exercise of this discretion, he began the foreclosure of two mortgages while they and the secured notes were yet in K.'s hands. While the actions were pending, plaintiff, a junior mortgagee, paid to C. the full amount of the two mortgages, with the interest and costs then accrued, and employed another attorney to proceed with their foreclosure. Afterwards K. sent the notes and mortgages to C., with knowledge that the actions had been commenced and were pending, and C. delivered them to plaintiff. *Held* that C. having had the authority to commence the suits, and having afterwards received the papers, the defect in his apparent right to receive payment when made, caused by the absence of the papers, was cured, and that the transaction was in the nature of an equitable assignment, entitling plaintiff to be subrogated to all the rights of K., and to prosecute the foreclosure cases by their original titles, but for his own use and benefit. (Compare *Harbach v. Colvin*, 73 Iowa, 638). *Sessions v. Kent*, 601.

6. PURCHASE BY WIFE UNDER SENIOR LIEN: REDEMPTION. Where the mortgagor's wife signs mortgages only to relinquish her dower, and to secure her husband's debts, she may acquire title to the land under a foreclosure of the senior mortgage, the same as any other person, and the junior mortgagee, who has been made a party to the foreclosure, is not entitled to redeem from her after the statutory time has expired. *Toliver v. Morgan*, 619.

7. FRAUDULENT TITLE OF MORTGAGOR: GOOD FAITH OF MORTGAGEE. Where a wife held the legal record title to land, but held it in fraud of her husband's creditors, a mortgage made by her and her husband to a person who had no knowledge of the fraud, and taken by him in good faith and for a valuable consideration, was properly decreed to be a lien superior to a judgment against the mortgagors, rendered after the mortgage was executed and recorded, and superior to a sheriff's deed made on the sale of the land to satisfy such judgment. *Clapp v. Saunders*, 634.

8. FOR CHATTEL MORTGAGES, see that title.

See ADVERSE POSSESSION, 1; JUDICIAL SALE, 2; STATUTE OF LIMITATIONS, 4.

MUNICIPAL CORPORATIONS.

See CITIES AND TOWNS: COUNTIES; SCHOOLS AND SCHOOL DISTRICTS.

MURDER.

BAIL. See CRIMINAL LAW, 11.

NEGLIGENCE.

1. PLEADING: EVIDENCE. Where a recovery is sought on the ground of certain negligence described in the petition, evidence of negligence in some other respect is properly excluded. *Davidson v. Central Iowa Ry. Co.*, 22.

2. OF DRIVER: IMPUTATION TO INVITED PASSENGER. In an action against the defendant town for an injury to the plaintiff caused by a defect in defendant's street, it appeared that plaintiff was at the time of the injury riding in the carriage of a neighbor, upon his invitation, and that the carriage was driven by one who had been the neighbor's servant, but whose term of service had expired on the previous day, and that the driver was guilty of negligence contributing to the injury, and that plaintiff neither assumed nor exercised any control over the driver of the team. *Held* that in such case the contributory negligence of the driver could not be imputed to plaintiff so as to defeat his recovery. (See opinion for cases distinguished, and for a discussion of the doctrine of imputed negligence upon the authorities). *Nesbit v. Town of Garner*, 314.

3. ———: ———: COMMON PURPOSE: QUESTION FOR JURY. In such case, if the driver and the plaintiff were at the time of the accident engaged in the pursuit of a common purpose, the negligence of the driver might have been imputed to plaintiff, under the rule of *Payne v. Chicago, R. I. & P. Ry. Co.*, 39 Iowa, 523, and whether they were so engaged was a question for the jury under the evidence. *Id.*

See CITIES AND TOWNS, 2, 3; MASTER AND SERVANT, 1, 2; RAILROADS, 11–34.

NEGOTIABLE INSTRUMENTS.

See PROMISSORY NOTES.

NEW TRIAL.

1. NEWLY-DISCOVERED EVIDENCE. A new trial should not be granted upon the ground of newly-discovered evidence which is merely cumulative and impeaching. *Donnelly v. Burkett*, 613.

2. NEWLY-DISCOVERED EVIDENCE: SHOWING OF DILIGENCE. A new trial on the ground of newly-discovered evidence should not be granted upon a mere general showing that the affiant was unable to find or procure the evidence prior to the trial. There should be a showing of facts constituting diligence. *Boot v. Brewster*, 631.

NOTARY PUBLIC.

COUNTY OF: JUDICIAL NOTICE OF. See Tax Sale and Deed, 6.

NOTICE.

1. BY RECORDING OF INSTRUMENTS. See Chattel Mortgages, 6, 7.

2. OF PRIOR EQUITIES. See Chattel Mortgages, 7; Fraudulent Conveyance, 7, 9; Vendor and Vendee, 1.

3. LIS PENDENS. See Fraudulent Conveyance, 8.

NUISANCES.

1. ABATEMENT BY CITY. See Cities and Towns, 8.

2. FOR LIQUOR NUISANCES, see Intoxicating Liquors, *passim*.

3. OBSTRUCTION OF STREAM: INJUNCTION. See Water and Watercourses, 2.

OFFICERS.

See BOARD OF SUPERVISORS; CITIES AND TOWNS, 6, 7; CONSTABLE; COUNTY TREASURER; JUDGES; SCHOOLS AND SCHOOL DISTRICTS.

ORIGINAL NOTICE.

1. EVIDENCE OF SERVICE. See Judgment, 1, 8, 9.

2. FATAL DEFECT IN. See Statute of Limitations, 1.

PARENT AND CHILD.

CUSTODY OF CHILD OF DIVORCED PARENTS: COMMITMENT TO STRANGER. The parties hereto had been divorced, and the contention was as to the right to the custody of their child of tender years. The evidence (see opinion) showed that the mother was not a fit person to have the custody of the child, and the court decreed that it should be placed in the custody of her brother. *Held* that this was error, as it did not affirmatively appear either that the brother was a proper person to be entrusted with the child, or that the father was not such a person; the rule being that a child should not be taken from its parents and committed to another without an affimative showing of the unfitness of the parents, and the fitness of such other person. *Farrar v. Farrar*, 125.

PARTIES TO ACTIONS.

See CHURCHES, 1; INTOXICATING LIQUORS, 1, 3, 5; JUDGMENT, 6.

PARTITION.

LANDS OF ESTATE: ACTION BEFORE DEBTS PAID. While a partition of the lands of a decedent ought not to be ordered until it is determined that the personal estate is sufficient to pay the debts (*Thomas v. Thomas*, 73 Iowa, 657), yet an action may be begun before that time, and if it does not appear at the time partition is made that it will be necessary to resort to the real estate to pay the debts, the decree ought not to be disturbed. *Snyder v. Snyder*, 255.

PARTNERSHIP.

1. INSOLVENCY: PRIOR RIGHTS OF FIRM CREDITORS. Where a firm makes an assignment for the benefit of creditors, the creditors of the firm are entitled to be paid in full before a creditor of one member is entitled to anything, even though, as between the members themselves, that one member is the equitable owner of all the firm property. *In re Assignment of Hooker*, 377.

2. NO EVIDENCE TO ESTABLISH. *Fargo v. Peterson*, 768.

PAYMENT.

1. IN FARMERS' NOTES: IMPLIED WARRANTY AS TO COLLECTIBILITY. In the case of executory contracts for the sale of personal property not open to the inspection of the buyer, or not in existence when the contract is made, and which is not so particularly described as to leave no room for question, there is an implied warranty that the property to be furnished shall be merchantable. (See *McClung v. Kelley*, 21 Iowa, 511). On the same principle, an agreement to pay a fixed sum in farmers' notes, without specifying the particular notes to be delivered, carried with it an implied warranty that the notes should be collectible. *Russell v. Critchfield*, 69.

2. ——— : DEMAND. In such case, where the time for the delivery was fixed, and the defendant claimed that he had delivered all the notes required by the agreement, and did not raise the issue that no demand had been made for the notes before the commencement of an action based on his failure to deliver sufficient good notes, *held* that there was no error in rendering judgment against defendant without proof of demand. *Id.*

3. VOLUNTARY: TO RELEASE ATTACHMENT: RECOVERY: INSTRUCTION. Defendant sued plaintiff in attachment, and plaintiff, knowing all the facts in the case, voluntarily paid defendant's demand for the purpose of releasing the attachment, but under a promise (as he alleges in this action for the recovery of the money) that defendant would repay the money if plaintiff would show him that he was not indebted to him when the attachment was begun. *Held* that such promise of repayment was not without consideration, and that, upon proof of it, and of the further fact that plaintiff did not owe defendant at the time, plaintiff was entitled to recover; and that the rule that a voluntary payment, with knowledge of the facts, cannot be recovered, unless made under compulsion which is illegal, unjust and oppressive, did not apply. *Lyman v. Lauderbaugh*, 481.

4. ——: ——: PROMISE TO REPAY: CONSTRUCTION. In such case the agreement to repay the money did not require, as a condition precedent to the commencement of the suit to recover it, that plaintiff should satisfy defendant that he did not owe it to defendant when paid; but it was sufficient if he did not in fact owe it, and if that fact was shown by the evidence in the case. *Id.*

5. ——: RECOVERY: INSTRUCTION. In an action to recover money paid to secure the release of an attachment, and under a conditional promise to repay, the petition alleged that the demand on which payment was made was illegal and unjust, but neither fraud nor extortion was alleged in the petition, nor shown by the evidence. *Held* that instructions from which the jury might have found that the payment was made under fraud, compulsion or extortion were not warranted by the pleadings or the evidence. *Id.*

6. UNDER COMPULSION: RECOVERY. See Conspiracy, 1, 2.

7. WHAT IS NOT. See Promissory Notes, 6.

See ACCORD AND SATISFACTION, 1; MORTGAGES, 5.

PEDDLING.

WHAT IS NOT: CITY ORDINANCE. A peddler is one who travels about with merchandise for the purpose of selling it; but a person in the service of a resident business establishment, who goes about the city carrying samples of goods kept for sale by the establishment, and solicits orders to be filled by his employers, is not a peddler, and is not subject to punishment as a peddler under a city ordinance declaring such acts to be peddling. (Compare *Town of Spencer v. Whiting*, 68 Iowa, 678). *City of Davenport v. Rice*, 74.

PERSONAL INJURIES.

1. EVIDENCE. In an action for a personal injury, a non-expert may state such facts as to the appearance of the injury a short time after its occurrence as may aid the jury in determining its extent. *Weber v. City of Creston*, 16.

2. MEASURE OF DAMAGES. A brakeman, nineteen years of age, and qualified only for the work of a laborer, but who was a strong and active man, was injured by defendant's negligence so that he suffered excruciating pain for a long time, and the joints of his ankle and foot were stiffened, making him a cripple for life. *Held* that this court could not disturb a verdict of eight thousand dollars as being excessive. *Henry v. Sioux City & P. Ry Co.*, 84.

3. PRIOR CONDITION OF PLAINTIFF: EVIDENCE. In an action for a personal injury, an inquiry into the plaintiff's physical condition eighteen moths prior to the injury complained of is immaterial, where no connection between that condition and her condition at the time of the alleged injury is shown or pleaded. *Redfield v. Redfield*, 485.

See CITIES AND TOWNS, 2–5; RAILROADS, 11–14, 24–34; ASSAULT AND BATTERY.

PHARMACIST.

1. PERSON SELLING DRUGS ON FORECLOSURE OR JUDICIAL SALE NEED NOT BE. See Chattel Mortgages, 4.

2. SALE OF LIQUORS BY. See Intoxicating Liquors, 14, 19, 20, 23, 24.

PLEADING.

1. CONFESSION AND AVOIDANCE: CONFESSION BY IMPLICATION. A plea in avoidance must, for the purposes of the plea, confess the matter which it seeks to avoid; but such confession need not be in terms, but may be by implication; and such implication will arise by operation of law where the plea in avoidance does not deny any of the matter sought to be avoided. *Day v. Mill-Owners' Mut. Fire Ins. Co.*, 694.

2. REPLY: CONFESSION AND AVOIDANCE: EFFECT OF IMPLIED CONFESSION ON IMPLIED DENIAL. Since the averments of an answer in which no counter-claim is pleaded are deemed to be denied by operation of law, and since a denial implied by law is governed by the same rules as one formally pleaded, and since inconsistent defenses may be stated in the same reply, it follows that the denial which is implied by law is not waived by pleading a defense in the reply which is inconsistent therewith. And in this case, where defendant pleaded a certain fact in defense, and plaintiff, in his reply, pleaded matter in avoidance, without fully admitting such defense, *held* that, while he must be regarded as admitting it for the purposes of his plea in avoidance, yet it is not to be regarded as admitted as against the denial which arose by operation of law, so as to relieve the defendant from the burden of proving it. (See opinion for cases cited). *Id.*

3. ACTION AT LAW: CHANGE TO EQUITY BY AMENDMENT. A party is not estopped, by beginning his action at law, from amending his pleadings before the final submission, so as to change it into an equity action. *Barnes v. Hekla Fire Ins. Co.*, 11.

4. SEVERAL CAUSES OF ACTION IN UNDIVIDED PETITION: DEMURRER. Where a petition not separated into divisions contains distinct causes of actions, a demurrer to one of them may be sustained, and the plaintiff cannot urge the defect of his pleading to defeat the demurrer. (Compare *Wright v. Connor*, 84 Iowa, 242). *Burhans v. Squires*, 59.

5. ORDER TO DIVIDE COUNT: SUBSTITUTE NOT IN COMPLIANCE STRICKEN OUT. Plaintiff, in one count, sued defendant for constructing sidetracks in front of his premises; for improperly using such tracks; for casting snow upon his premises; and for constructing drains and ditches, and depositing dead animals, in front of his premises. *Held* that the court properly ordered him to plead his separate causes of action in separate counts; and that, when he filed a substitute without attempting to comply with the order, the court properly sustained a motion to strike it from the files. *O'Conner v. Chicago, R. I. & P. Ry. Co.*, 617.

6. AMENDMENT: STRICKEN FROM FILES: ACTION ON GUARDIAN'S BOND. A minor, just prior to his majority, assigned a portion of his estate to plaintiff, and after his majority assigned the whole of it to P. Afterwards, P. recovered a judgment for the whole in an action on the guardian's bond. While this action was pending, plaintiff commenced an action on the guardian's bond to recover the amount assigned to him, and,. by amendment, he made P. a party. Plaintiff 's real ground of action against P. was that the latter, as a part of the consideration of the assignment to him, had agreed to pay plaintiff; but plaintiff pleaded this fact for the first time at the close of the evidence. *Held* that the court did not abuse its discretion in striking this amendment from the files, because it was the first plea of any real cause of action; the original action on the guardian's bond being without ground, since the guardian had already been adjudged to pay the money to P. *Nelson v. Hays*, 671.

7. REPETITION: STRIKING OUT. A party is not prejudiced by striking out a portion of his answer, when the same defense is set up in another part of his answer which is allowed to stand. *Van Horn v. Overman*, 421.

8. AMENDMENT: TIME TO ANSWER: WHEN NOT GRANTED. There is no error in refusing time to answer an amendment filed to conform the petition to the proofs, where the record shows that the cause was in fact tried upon the theory disclosed by the amendment. *George v. Swafford*, 491.

9. AMENDMENT: CHANGE OF PRAYER. Where a plaintiff, upon certain facts stated in his petition, prays for relief to which such facts do not entitle him, he may properly be allowed to file an amended petition, setting up the same facts substantially, and praying for appropriate relief, and then to withdraw and dismiss his original petition. *Cook v. Chicago, R. I. & P. Ry. Co.*, 169.

10. AMENDMENT: DISCRETION OF COURT. It is within the discretion of the court to allow a material amendment to be made in the pleadings at any time. (Code, sec. 2689). *Eslich v. Mason City & Ft. D. Ry. Co.*, 448.

11. AMENDMENT TO PETITION: ADMISSION BY FAILURE TO ANSWER. An amendment to a petition setting up a material fact, which is not denied by answer, is regarded as admitted. (Code, sec. 2712). *Id.*

See CONSPIRACY, 1; INSURANCE, 4-7; JUDICIAL SALE, 1; NEGLIGENCE, 1; PAYMENT, 2; PRACTICE, 6; PLEDGE, 1; PROMISSORY NOTES, 1, 2, 6-8; STATUTE OF LIMITATIONS, 8.

POSSESSION.

1. CONSTRUCTIVE: OF LAND UNDER TAX DEED. See Tax Sale and Deed, 12.

2. OF LAND: NOTICE OF RIGHTS. See Vendor and Vendee, 1.

See ADVERSE POSSESSION; GIFT, 8.

PRACTICE AND PROCEDURE.

1. ARGUMENT TO JURY: NUMBER OF COUNSEL. Every party to an action tried to a jury is entitled to have every fact or point essential to his case called to the attention of the jury by his counsel in argument; and, guided by this principle, the court may, in its discretion, determine whether one or more counsel shall address the jury either in the opening or closing of the argument. Accordingly, where plaintiffs had two counsel, and one of them addressed the jury in the opening argument, and then stated that they would next be addressed by counsel for defendant, after which his associate would address them further on behalf of the plaintiffs, and the court then adjourned until the next morning, when defendant's counsel waived their right to address the jury, whereupon plaintiff's counsel who was to have made the closing argument claimed the right to futher address the jury, which claim was denied, *held* that this court could not say that in this the court abused its discretion; it not appearing that there was any failure by the counsel who addressed the jury to fully and fairly present every fact and point material to plaintiffs' case. (See opinion for statutes considered). *Carruthers v. McMurray*, 178.

2. MISCONDUCT OF COUNSEL: DUTY AND DISCRETION OF TRIAL COURT: APPEAL. It is improper and censurable practice for an attorney to make statements, designed *to* prejudice a party to the suit, which are not justified by the record in the case; and a question which charges dishonesty, though withdrawn, may be as prejudicial as a statement to the same effect. And it is the duty of courts to require attorneys to observe this rule, and, when it is violated, to set aside the verdict, unless satisfied that the misconduct was not instrumental in securing it. But an application to set aside the verdict must be determined by the trial court in the exercise of a sound discretion, and this court will not interfere unless an abuse of such discretion is shown. *George v. Swafford*, 491.

3. EXAMINATION OF WITNESSES: CONTROL OF COUNSEL. A witness was asked on cross examination, in language hardly proper, whether his testimony was not false, which question he resented. Another question of like import was then asked, to which an objection was sustained. *Held* that the court properly stopped the course of the examination; because, while witnesses may be so interrogated as to test their truthfulness, this should be done in such a manner that unseemly scenes between them and counsel may be avoided. *Baldwin v. St. Louis, K. & N. W. Ry. Co.* 297.

4. MOTION TO PRODUCE BOOKS OF ACCOUNT: DISCRETION OF COURT. A motion to compel the plaintiff to produce his books of account for the purpose of being inspected and copied was made on the morning of the day set for the hearing of the case. The plaintiff resided and did business in Chicago, and the issues in the case had been made up, and the case set down for hearing on depositions, six months previous to the motion. *Held* that the court did not, in overruling the motion, abuse the discretion vested in it by the statute. (See Code, secs. 3685, 3686, and *Allison v. Vaughn*, 40 Iowa, 421). *Schmidt v. Kiser*, 457.

5. TRIAL NOTICES: RULE OF COURT: CONSTRUCTION: REVIEW. A rule of the district court provided for making orders during the term for the service of trial notices ten days prior to such date as the court might name; and that court, in construing the rule, held that it authorized an order for the service of a trial notice in a special case. *Held* that this was a reasonable construction of the rule; but that if it were doubtful, admitting of an honest difference of opinion, this court would not interfere with that court's construction of its own rule. *Baldwin v. St. Louis, K. & N. W. Ry. Co.* 297.

6. STRIKING OUT PLEA: RESTORATION AFTER EVIDENCE CLOSED: FURTHER EVIDENCE: PREJUDICE WAIVED. The court sustained a motion to strike out a division of plaintiff's answer designed to plead an estoppel. After the evidence had been offered and the argument to the jury begun, the court concluded that an estoppel had been well pleaded, and offered plaintiff the privilege of introducing evidence on that issue. Plaintiff then introduced one witness, but did not ask for delay to procure other evidence, and made no objection to proceeding at once to the submission of the case to the jury. *Held* that it was the privilege and duty of the court to correct its ruling, if found to be erroneous, but that it was plaintiff's duty to ask for such further action as would save him from prejudice after such correction; and that, having consented to the submission of the cause, he could not, on appeal, be heard to complain that he was prejudiced by the court's action. *Van Horn v. Overman*, 421.

7. EVIDENCE: FACTS KNOWN TO JUDGE. It would *seem* that in passing upon a motion to strike a bill of exceptions from the files, the court may consider facts known to himself and stated at the hearing, as well as affidavits filed in the case. *Foster v. Hinsen*, 291.

8. FILING PAPERS: WHAT ESSENTIAL. Where a bill of exceptions was left with the judge to be corrected, signed and filed by him, and he handed it to the clerk to be filed, *held* that it was filed in contemplation of law, even though the clerk failed to indorse it as filed and to make a note of it in the appearance docket. (Compare *Royer v. Foster*, 62 Iowa, 321, and *State v. Briggs*, 68 Iowa, 416). *Id.*

9. PROCEDURE: TO COLLECT JUDGMENT AGAINST GUARDIAN: ORDER IN PROBATE. Plaintiff, in a suit by attachment against defendant's ward, had procured judgment in the district court against defendant, in his capacity as guardian, as garnishee. Afterwards, defendant having failed to pay the judgment, plaintiff in the same court, acting as a court of probate, procured an order commanding defendant as guardian to pay the judgment. *Held* that this was a proper method of collecting the judgment. *Coffin v. Eisiminger*, 80.

10. ——: ——: LIMITATION OF TIME: CODE, SECTION 2521. It is no objection to such procedure that the application to the court of probate was made in less than fifteen years after the rendition of the judgment, for such application was not an action upon the judgment within the meaning of section 2521 of the Code, prohibiting actions on judgments of courts of record within fifteen years after their rendition. *Id.*

11. FOR PRACTICE IN CRIMINAL CASES, see Criminal Law, *passim*.

12. SPECIAL INTERROGATORIES. See Instructions, 19, 20.

See CONTINUANCE, 1, 2; EVIDENCE, *passim*; INTERVENTION, 1; PLEADING, *passim*; PRACTICE AND PROCEDURE IN SUPREME COURT.

PRACTICE AND PROCEDURE IN SUPREME COURT.

1. NOTICE OF APPEAL : SERVICE ON CLERK : PROOF : NOTICE LOST : CORRECTION OF RECORD : WAIVER. A failure to have the transcript show a service of the notice of appeal upon the clerk of the trial court is not of itself sufficient to defeat the appeal, where the appellant shows by affidavit that the notice was in fact served on the clerk, but that the notice itself, with the proof of such service, has been lost from the records below. In that case he may have a continuance for the purpose of perfecting the record in the trial court. (*Gardner v. Burlington, C. R. & N. Ry. Co.*, 68 Iowa, 589). Where, however, the abstract recites that the notice was duly served on the clerk, and the appellee does not ask to have the lost notice restored, and does not object to the competency of the evidence offered in this court to show the fact of service, the cause may be submitted on its merits. *Malcomsen v. Graham*, 54.

2. ASSIGNMENT OF ERRORS : TOO GENERAL. Two of the twenty-nine grounds of the motion for a new trial in this case were : (1) "The verdict is contrary to law," and (2) "The verdict is contrary to the evidence." The only reference to the grounds of the motion made in the assignment of errors was as follows : "The court erred in not granting plaintiff's motion to set aside the verdict, arrest the judgment, and grant a new trial, for the reasons stated therein," and the question whether the verdict was sustained by the evidence was not otherwise presented. *Held* that the assignment was too general to raise that question on appeal. *Duncombe v. Powers*, 185.

3. ASSIGNMENT OF ERRORS : RULINGS ON EVIDENCE : TOO GENERAL. The assignment of errors in the admission and exclusion of evidence in this case (for which see opinion) is *held* to be too general to present any question for review. *Id.*

4. EVIDENCE WANTING. Where the abstract does not purport to contain all the evidence, and appellee insists that a large part of it is omitted, this court cannot consider whether the verdict was sustained by the evidence. *Gray v. Chicago, M. & St. P. Ry. Co.*, 100.

5. STATEMENT OF ABSTRACT AS TO EVIDENCE. Setting out in the abstract a certificate of the trial judge, to the effect that the bill of exceptions contains all the evidence, is not equivalent to saying that the abstract contains all the evidence, and is insufficient to justify this court in reviewing the evidence to see whether it sustains the judgment appealed from. *Walrod v. Flanigan*, 365.

6. MEANING OF "RECORD": TOO TECHNICAL. After defendant had introduced his evidence, the plaintiff moved the court to instruct the jury to find a verdict in his favor based upon the record that had been made in the case. An objection in this court, that the motion was not based on the evidence, because it had not yet been made of record, *held* too technical for consideration, in view of the evident meaning of the words as used. *Martyn v. Lamar*, 235.

7. AMENDMENT OF ABSTRACT : TIME. An appellant has a right to file an amendment to his abstract, when done before the argument of appellee is served on him, and in ample time to permit appellee to make any argument he desires on the record as amended. *Groneweg v. Kusworm*, 237.

8. TRIAL DE NOVO: CERTIFICATION OF EVIDENCE BY DEPOSITION. A recital in the certificate of the trial judge to the evidence in an equity case, that the cause was submitted upon packages of depositions filed upon certain dates, does not identify such evidence as required by chapter 35, Laws of 1882, repealing and amending section 2742 of the Code. The certificate should, by setting out the name of the witness, or the name of the officer before whom the deposition was taken, and the date when taken, or other explicit recital, identify with certainty the items of evidence referred to. (*Cross v. Burlington & S. W. Ry. Co.*, 58 Iowa, 63, which arose before the enactment of said statute, *distinguished*). *Runge v. Hahn*, 733.

9. TRIAL DE NOVO: DEFECTIVE ABSTRACT. The certificate of the trial judge that the record contains all the evidence introduced and offered is not sufficient to authorize a trial *de novo* in this court, where the abstract fails to state that it contains all the evidence contained in the record. *Polk County v. Nelson*, 648.

10. TRIAL DE NOVO: CERTIFICATION OF EVIDENCE. Where the trial judge, at the trial term, certified to the short-hand reporter's notes as containing all the evidence introduced and offered, together with objections and rulings thereon, and exceptions of parties; and the reporter, within six months, filed in the clerk's office a duly certified translation of his notes, with a transcript of the judge's certificate, *held* that the evidence was sufficiently certified to authorize a trial *de novo* in this court. (Compare *Merrill v. Bowe*, 69 Iowa, 653). *Adams County v. Graves*, 642.

11. TRIAL DE NOVO: OBJECTION TO EVIDENCE. When a case is triable *de novo* in this court, an objection to the competency of evidence, which was made below, may be renewed, even though no exception was taken to its admission below. *Cochrane v. Breckenridge*, 218.

12. TRIAL DE NOVO: KIND OF ACTION. Where it appears from the record that in the trial below both the parties and the court regarded the action as an equitable one, and that it was tried upon that theory, it will be so regarded and tried in this court. *Bryant v. Fink*, 516.

13. QUESTION NOT RAISED BELOW: KIND OF PROCEEDINGS. This cause having been begun and tried in the court below as a law action, without any objection on the part of defendant, he cannot, on appeal, be heard to complain that it should have been tried as an action in equity. He should have moved in the trial court to transfer it to the equity calendar, as provided by Code, section 2514. *Spelman v. Gill*, 717.

14. RULINGS ON EVIDENCE: NO EXCEPTIONS. The admission of incompetent evidence against appellant's objection is no ground for a reversal, where the record does not show that exceptions were taken and preserved to the rulings of the court admitting the evidence. *Id.*

15. NO APPEAL TAKEN: OBJECTION TOO LATE. Where an appellee appears in this court, files an additional abstract, agrees to the record for submission, resists a motion for a continuance, and makes the first argument in the case, he cannot be heard to say that no appeal has been taken, when the appellant's abstract alleges to the contrary, and he denies it for the first time in his reply. *Roundy v. Kent*, 662.

16. OBJECTION NOT RAISED BELOW. An objection not shown by the record to have been raised in the court below cannot be heard in this court. *Wyland v. Frost*, 209.

17. QUESTION NOT RAISED BELOW: FAILURE OF CONSIDERATION. In an action for money to be paid upon the delivery of a release, no claim was made below that the release, if executed and delivered, would have been a legal nullity, and that hence the agreement to deliver it was no consideration for the promise to pay. *Held* that that question could not be raised for the first time on appeal. *Nelson v. Wilson*, 710.

18. OBJECTION NOT RAISED BELOW. This court will not consider objections to rulings on instructions which were not raised in the trial court. *Gray v. Chicago, M. & St. P. Ry. Co.*, 100.

19. EVIDENCE: NO PROPER OBJECTIONS BELOW. Merely to object to evidence without giving any grounds for the objection lays no foundation for a review of the evidence in this court. *Lewis v. Lewis*, 669.

20. OBJECTION TO PETITION: TOO LATE. Where defendant answered the petition, went to trial and introduced his evidence, and did not attack the sufficiency of the petition in any form, either before or after verdict, *held* that he could not do so on appeal. *Martyn v. Lamar*, 235.

21. INSTRUCTIONS: REVIEW. The instructions given on the trial are the law of the case for the jury, and the appellee in this court cannot be heard to say that they are wrong, in order to avoid a reversal on the ground that the verdict of the jury is in conflict therewith. *Rhines v. Chicago & N. W. Ry. Co.*, 597.

22. INSTRUCTIONS ASKED BY APPELLANT: OBJECTIONS ON APPEAL. One cannot on appeal be heard to object to instructions given at his own request. *Duncombe v. Powers*, 185.

23. ——: FAILURE TO GIVE WHEN NOT ASKED. When the court fully and fairly presents the issues and directs the jury as to their duty, a party cannot on appeal be heard to complain that other instructions, not asked by him, were not given. *Id.*

24. ——: REVIEW: NO FOUNDATION FOR. An appellant cannot complain in this court of instructions given to which he did not except, nor of the neglect of the court to give a special instruction which he did not ask for. *Id.*

25. INSTRUCTION: NO EXCEPTION TAKEN. Where no exception was taken to an instruction, nor to a motion for a new trial based on error in giving it, this court cannnot review it. *Lewis v. Lewis*, 669.

26. EXAMINATION OF WITNESSES: DEFECTIVE ABSTRACT. Whether the conduct of the trial court in examining witnesses was erroneous or prejudicial, is a question which cannot be considered on appeal when the abstract does not give all the evidence and proceedings on the trial. *Id.*

27. PREJUDICE PRESUMED FROM ERROR. Where the jury found generally for defendant upon several defenses pleaded, and the court gave an erroneous instruction, unfavorable to plaintiff, as to one of the defenses, and it could not be determined that the verdict was not based on that defense, and thus influenced by the erroneous instruction, *held* that prejudice to plaintiff must be presumed, and the cause reversed. *Hibbard v. Zenor*, 471.

28. ERROR WITHOUT PREJUDICE. Errors committed in favor of an intervenor, to whom no relief of any kind is finally granted, are without prejudice, and no ground of complaint on appeal. *Farmers' Bank of Jessup v. Arthur*, 129.

29. EVIDENCE: RULINGS NOT PREJUDICIAL. Rulings admitting and excluding evidence which could not affect the verdict either way are not prejudical, even if erroneous, and are no ground for reversal. *State v. Pugsley*, 742.

30. FROM RULINGS ON EVIDENCE: NO PREJUDICE SHOWN. In an action for injuries on account of a defective bridge, there was judgment for the defendant, and plaintiff appeals, and assigns errors only upon rulings on evidence. But there is nothing in the abstract showing that he introduced or offered any evidence of damages sustained by him. *Held* that the errors complained of must, in the absence of such evidence, be regarded as without prejudice. *Donnelly v. Cedar County*, 536.

31. JURISDICTION: NO SHOWING OF APPEAL TAKEN. This court has no jurisdiction of a cause in which the abstract fails to show that an appeal has been taken or attempted. *Id.*

32. PRACTICE: REVERSAL FOR NOMINAL DAMAGES. This court will not reverse a cause for the mere error of the trial court in refusing to award nominal damages to the appellant. *Thorp v. Bradley*, 50; *Stewart v. Trotter*, 96.

33. COMPLAINT OF REMARKS OF COURT: RECORD. The court, in the course of the cross-examination of the complaining witness on a trial for an assault with intent to rape, directed the defendant's counsel to treat the witness with respect. It did not appear from the record that any disrespect had been shown in the words used by counsel, but there was nothing to show his manner, nor the manner of the court in directing him. *Held* that this court must presume, in favor of the trial court, that there was some just ground for the direction to counsel, and that it was given in a proper manner. *State v. Hatfield*, 592.

34. MISCONDUCT OF COUNSEL: RECORD. This court cannot pass on the effect of misconduct of counsel below, when the only reference thereto in the record is in the form of a statement contained in the motion for a new trial. (See *Rayburn v. Central Iowa Ry. Co.*, 74 Iowa, 637). *Gray v. Chicago, M. & St. P. Ry. Co.*, 100.

35. ERRORS ASSIGNED BUT NOT ARGUED, AND VICE VERSA. Errors assigned but not argued, and those argued but not assigned, will not be considered by this court. *Duncombe v. Powers*, 185.

36. EVIDENCE TO SUPPORT VERDICT. There being evidence tending to show that a note and mortgage given by a husband to his wife was founded upon a valid consideration, and was not designed to defraud creditors, *held* that a verdict to that effect could not be disturbed by this court. *First Nat. Bk. of Nevada v. Fenn*, 221.

37. VERDICT: EVIDENCE. Where a verdict is based on conflicting evidence, this court cannot set it aside as not being supported by the evidence. *Donnelly v. Burkett*, 613.

38. EVIDENCE TO SUPPORT VERDICT. Though the evidence to support a verdict is meagre, this court will not set it aside for that reason. *Acrea v. Brayton*, 719.

39. CRIMINAL CASE: EVIDENCE TO SUSTAIN FINDING OF COURT. The finding of the district court, upon the trial, without a jury, of an assault and battery case on appeal from a justice, has the effect of the verdict of a jury, and will not be disturbed in this court for want of evidence to support it, when the evidence is conflicting. *State v. Boynton*, 753.

40. COSTS OF PREPARING ADDITIONAL ABSTRACT. While it is the duty of an appellant to submit to this court a fair abstract of so much of the record as is material to the question involved in the appeal, yet the expense of preparing an additional abstract by the appellee will not be taxed to the appellant, where there is no reason to believe that he intentionally omitted from his abstract anything which he believed to be material. *Schneitman v. Noble*, 120.

41. COST OF ADDITIONAL ABSTRACT. Appellee filed an additional abstract in this case setting out all of the evidence, which appellant complains of as being unnecessary, and asks that the cost thereof be taxed to appellee. But the claim of appellee, that its purpose was to show that the evidence sustained the judgment appealed from, appearing to be made in good faith, the costs of the abstract are taxed to the appellant, upon the affirmance of the judgment. *King v. Mahaska County*, 880.

42. CORRECTING VERDICT: ERROR NOT SHOWN. Where it does not affirmatively appear that items withdrawn by plaintiff from his account during the trial were included in the verdict, this court cannot say that the court erred in refusing to deduct the amount of such items from the verdict found, even though the court neglected to instruct the jury as to the effect of their withdrawal. *McVey v. Johnson*, 165.

43. SECOND APPEAL AFTER AFFIRMANCE ON FIRST. Plaintiff appealed to this court from the judgment against him, and, upon failure to perfect the appeal, it was affirmed on motion. *Held* that, while such judgment of affirmance stood, even though it was erroneously entered, a second appeal could not be maintained. *Trulock v. Friendship Lodge*, 381.

44. PRACTICE: REVIEWING DECISION ON PRIOR APPEAL. This court will not, on a second appeal, review or reverse a decision made on a prior appeal of the same case. (*Adams County v. Burlington & M. R. Ry. Co.*, 55 Iowa, 94, *followed*). *Heffner v. Brownell*, 341.

45. AGREEMENT FOR SUBMISSION. An agreement that appellee's abstract shall be set aside and the cause submitted on appellant's abstract is binding on the parties, and will be observed by this court, even though appellant's abstract fails to show that an appeal was taken, and the cause must therefore be dismissed. *Talbort v. Noble*, 167.

46. ———: CONSULTING TRANSCRIPT. In such case, where the stipulation made no reference to a transcript, *held* that the submission must be on appellant's abstract alone, and that appellant's claim that the transcript showed that she had taken an appeal could not be considered for the purpose of preventing the dismissal of the cause, because this court will never consult the transcript where there is no dispute as to the correctness of the abstract. *Id.*

47. CRIMINAL CASE: RECORD. This cause being submitted upon what purports to be a transcript of the record, but which is in no manner certified or authenticated, it cannot be considered, and the judgment is affirmed. *State v. Ill*, 543.

48. GUARDIAN'S REPORT: APPROVAL. No review in absence of evidence. *Berkholtz v. Richards*, 767.

49. TRIAL DE NOVO. See Boundaries, 1, 3.

PRESCRIPTION.

See HIGHWAYS, 1, 2; BRIDGES, 3.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETIES.

PRIORITY OF RIGHTS.

See ATTACHMENT, 4; INTOXICATING LIQUORS, 15; JUDICIAL SALE, 2; MORTGAGES, *passim*; PARTNERSHIP, 1; VENDOR AND VENDEE, 1.

PLEDGE.

SATISFACTION OF DEBT: RECOVERY OF PROPERTY: PLEADING. Plaintiff, having induced defendant to take an interest in a certain joint-stock company, undertook to secure him by placing in the hands of a trustee certain paid-up life insurance policies. This action was to recover the policies, on the ground that the defendant had been reimbursed for all advancements which they were designed to secure. The petition stated that one of the purposes of the pledge was to secure defendant against loss by reason of his connection with the company, as stockholder or otherwise, by reason of his investment in the stock of the company, or his taking any other pecuniary interest in its affairs. The petition did not allege that defendant had sustained no losses under this clause of the agreement, nor did it allege facts, as distinguished from legal conclusions, showing that defendant had been reimbursed for losses of that kind. The averment that defendant had money of the company in his hands more than sufficient to reimburse him for all liabilities for which the policies were held was not sufficient, in the absence of a showing that he had a right to use the money in that way. *Burhnas v. Squires*, 59.

PROBATE.

See APPEALS, 1; PRACTICE, 9, 10.

PROMISSORY NOTES.

1. GIVEN FOR INDEMNITY: AMOUNT OF RECOVERY: PLEADING. The defendant D. and another entered into two written contracts, reciting in the aggregate a consideration of three thousand dollars, for the delivery to plaintiff of seventy-five Mexican ponies. They at the same time, with the other defendant as surety, executed the promissory notes sued on in this case, for the aggregate sum of three thousand dollars, in which it was recited that they were given as collateral security for the performance of the pony contracts. The plaintiff set up the notes and the pony contracts, and the failure to perform the latter, and averred that he had actually paid three thousand dollars on the pony contracts, and that defendants orally agreed, after such failure, to pay the three thousand dollars named in the notes. The defendants answered, admitting the making of the pony contracts, and that the same had not been performed, and that the notes had not been paid, but denied every other averment of the petition. On these pleadings the court sustained a motion for judgment for the full amount of the notes. *Held* that this was error, because the notes were only given for indemnity, and plaintiff was entitled to recover upon them only the damages which he sustained by the failure to perform the pony contracts, which damage was not shown by the pleadings, since the averment that plaintiff had paid three thousand dollars for the ponies was denied. *Black v. DeCamp*, 105.

2. DEFENSE OF MATERIAL ALTERATION: JUDGMENT ON PLEADINGS. It was error to render judgment upon the pleadings in an action on a promissory note while an issue that the note had been materially altered by the insertion of the place of payment was undisposed of. *Id.*

3. OWNERSHIP: RIGHT OF ACTION. The note in suit was made to "the order of M., cashier of First National Bank of Jessup, Iowa," and by him indorsed to plaintiff, "for account of First National Bank of Jessup, Iowa." Plaintiff had possession of the note, and alleged that it owned it; and the answer by implication admitted such ownership, but denied generally all averments not admitted. *Held* that the proof of ownership was sufficient. *Farmers' Bank of Jessup v. Arthur*, 129.

4. LOSS OF COLLATERALS: DISCHARGE OF CO-MAKER. One of two makers of a note executed a chattel mortgage as collateral security. The mortgage appeared to have been made at the request and for the benefit of the other co-maker, and at his request it was withheld from the records, and the property was left in the hands of the mortgagor, who afterwards died. His administrator was unable to find some of the property, but such as he could find he sold, and applied the proceeds on the note. In an action against the surviving co-maker, *held* that plaintiff was not required to account for the property which could not be found; no duty being imposed upon it to preserve it. *Id.*

5. GUARANTOR: DISCHARGE: BURDEN OF PROOF. Before a guarantor of a note can be discharged by the failure of the holder to give him notice of non-payment, he must show by proper evidence that he has been prejudiced by such failure. *Martyn v. Lamar*, 235.

6. PLEA OF PAYMENT: WHAT IS NOT. In an action against the principal maker of a promissory note and his surety, they pleaded as a partial defense that there had been paid on said note by the surety to the plaintiff a certain sum in property, and a certain other sum in labor, but there was no allegation that the plaintiff had agreed to accept these items in part payment of the note. *Held* that the plea was not good as a plea of payment, because the plaintiff was not bound to accept anything but money in payment. *Corbett v. Hughes*, 281.

7. DEFENSE: COUNTER-CLAIM IN FAVOR OF SURETY ALONE In an action upon contract against several defendants, a cause of action against the plaintiff arising out of matters independent of the contract must be in favor of *all* the defendants, in order to be pleaded as a counter-claim. (Code, sec. 2659, subd. 3). And so, in an action on a promissory note against the principal and surety, a cause of action against the plaintiff and in favor of the surety alone cannot be so pleaded; but in such case, as an exception to the rule, a cause of action in favor of the principal alone may be pleaded. (See *Reeves v. Chambers*, 67 Iowa, 81). *Id.*

8. ACTION ON: MISJOINDER: NO PREJUDICE. Plaintiff in an original petition declared on three promissory notes, and in an amendment he set up what defendant denominated a cause of action for fraud and conspiracy, and the latter now complains that the trial court refused to strike the amendment from the files, and thus permitted a misjoinder of causes of action, and let in evidence prejudicial to him. But since the evidence complained of was not irrelevant to the issues raised on the action on the notes, and the jury found against defendant on those issues, *held* that the misjoinder, if there was any, was without prejudice. *Roberts v. Morrison*, 321.

9. EXECUTION: EVIDENCE. Defendant denied executing the notes in suit, but the jury found against him on that issue. His name was William T. Morrison, and he had a nephew named William Alexander Leroy Morrison. The notes were signed simply "William Morrison." It was shown that defendant had signed other papers in that way, and there was evidence from which the jury might have found that he signed the notes in person. There was evidence, also, from which the jury might have found that they were signed by the nephew, with the understanding and intention between him and the nephew that the signature should be imposed on the plaintiff as that of the defendant, and it was shown that he obtained a large portion of the property for which the notes were given, and that the nephew was a minor and insolvent. *Held* that the verdict against defendant could not be disturbed for want of evidence. *Id.*

10. PARTIES BOUND: PAROL. Parol evidence is inadmissible to show that it was the intention of all the parties to a promissory note that only one of the signers should be bound thereby, when the note itself clearly expresses the undertaking of the parties. *Heffner v. Brownell*, 341.

See SURETIES, 1–3

PUBLIC LANDS.

SURVEY: MISTAKE IN CALLS. A certain lot was surveyed and platted and located on the north side of a certain water supposed at the time to be the Missouri river; and the government plat and field-notes described the meander line as being at said river, but the water was in fact a bayou some distance from the river, and between it and the river was land which was never in fact surveyed. *Held* that the patent for the lot did not convey the land between the bayou and the river. *Glenn v. Jeffrey*, 20.

RAILROADS.

1. RAILROAD ON STREET: INJURY TO ABUTTING PROPERTY: EVIDENCE: CONDITION OF TRACK. In an action by the owner of property abutting on a street, for damages on account of a railroad built along the street, witnesses who gave their opinion as to the depreciation of the value of the property on account of the building of the road were allowed to state that the road was so built and maintained that the tops of the rails were from eight to twelve inches above the surface of the street, which was at or near the established grade. *Held* that this testimony was competent for the purpose of showing one of the facts on which the witnesses based their opinion. *Eslich v. Mason City & Ft. D. Ry. Co.*, 443.

2. ———: ———: DAMAGES: ESTOPPEL. Where defendant built its road along the street of a town under an ordinance requiring it to conform its track to the established grade, and it construed the ordinance as authorizing it to so construct its road that the ties should rest on the surface of the grade, and thus throw the rails wholly above the surface, and built and maintained its road in that way, *held* that it was estopped from claiming, in an action for damages by an abutting lot-owner, that it might be compelled under the ordinance to reduce its rails to the surface of the grade, and that therefore the plaintiff's damages ought not to be estimated upon the present condition of the road. *Id.*

8. ——— : ——— : EVIDENCE : FACTS ON WHICH OPINIONS OF WITNESSES ARE GROUNDED. One of defendant's witnesses, who was an insurance agent, gave his opinion as to the depreciation of plaintiff's property on account of the building of defendant's railroad along the adjacent street. On cross-examination he was permitted to testify that the annual premium for the insurance of the property would be two and one-half per cent. higher, and that he had not taken this into account in forming his opinion, but formed it upon the assumption that if the property was burned by fire set out by the road the defendant would be absolutely liable for the loss. *Held* that this evidence was properly admitted for the purpose of showing on what the witness had based his opinion. *Id.*

4. RIGHT OF WAY : APPEAL : PARTIES : OWNER AND MORTGAGEES. Where damages for right of way are awarded jointly to the owner and the mortgagees of the land, upon notice to all of them, the mortgagor may maintain an appeal from the award without making the mortgagees parties thereto. (*Lance v. Chicago, M. & St. P. Ry. Co.*, 57 Iowa, 636, *followed*). *Dixon v. Rockwell, S. & D. Ry. Co.*, 367.

5. RIGHT OF WAY : ABANDONMENT : TRESPASS BY RE-ENTRY. Under section 1260 of the Code, where a railroad company takes up its tracks from its fenced right of way, and the owner of the fee then removes the fences and encloses the right of way with the adjacent land, the company may, within eight years from the time of abandoning the use of the right of way, reënter the same, remove cross-fences, fence the right of way again, lay down its track thereon, and resume its use for the operation of its road, and will not by such acts be guilty of trespass. And the character of the road rebuilt and of the service thereon is immaterial, where the original grant of the right of way is not conditioned upon the character of the road and service thereon. *Fernow v. Chicago, M. & St. P. Ry. Co.*, 526.

6. FORFEITURE OF FRANCHISES BY NON-USER : WHAT IS NOT. The defendant company did not begin to build its railroad until more than two years after its organization, nor did the subscribers to the capital stock sooner pay up their subscriptions and take certificates of stock; but the company was continuously engaged in efforts, requiring the expenditure of money, to procure the additional means necessary to build the road. *Held* that these acts were such an exercise of its franchises as would prevent a forfeiture under section 1079 of the Code. *Young v. Webster City & S. W. Ry. Co.*, 140.

7. TAX IN AID OF : VALIDITY : PROMISES TO REMIT TAXES : EVIDENCE. The claim that a tax voted to aid the defendant company in the construction of its road was invalidated, under section 8, chapter 159, Laws of 1884, on the ground that the company procured the tax to be voted by promising taxpayers to remit their taxes, *held* not to be sustained by the evidence. *Id.*

8. ——— : ——— : COMPLIANCE WITH TERMS. The condition on which a tax was voted to aid in the construction of defendant's road was that the road should be built from a given point to some point of intersection with another road, so that there would be a continuous line of road to a named station on such other road. *Held* that this did not require that defendant should build a continuous line of road from the given point to such station, but that it was sufficient that such station might be reached by a continuous line by the use of the line of such other road from the point of intersection to such station. *Id.*

9. ——— : CITY IN TOWNSHIP : BY WHOM VOTE TO BE ORDERED. Where there is a city within the limits of a township, but not coterminous with the township, the township trustees may order the submission of the question whether the township, including the city, will vote a tax in aid of the construction of a railroad. *Id.*

10. ——— : ORDERING ELECTION : TOWNSHIP TRUSTEES : POWER OF MAJORITY : NOTICE TO THE OTHER. Where called meetings of boards of trustees or other bodies are necessary, it is not required, in the case of the absence of members, that the meetings be deferred until their return, in order that they may be notified thereof, but the majority may act without such notice. So *held* where two of the trustees of a township, without notice to the third one, who was absent from home, in a called meeting, ordered an election upon the question of voting a tax in aid of the construction of a railroad. *Id.*

11. INJURY TO TRAVELER AT CROSSING : CONTRIBUTORY NEGLIGENCE : QUESTION FOR JURY. A woman driving a horse to a buggy was approaching the crossing of several railroad tracks where a flagman employed by the defendant was habitually stationed. She stopped within half a block of the crossing to await an opportunity to cross. The flagman signaled for her to come on, which she did, though she knew a train was approaching on one of the tracks. When her horse had reached the first track the flagman stopped her, and the horse became frightened, turned, upset the buggy and ran away. There was evidence tending to show that, had the flagman not interfered, she would have effected the crossing in safety. These being the facts, *held*, in an action to recover for resulting injuries, that it was error to direct a verdict for the defendant on the ground that she was guilty, as matter of law, of contributory negligence, but that that question should have been submitted to the jury. *Buchanan v. Chicago, M. & St. P. Ry. Co.*, 393.

12. ——— : NEGLIGENCE OF FLAGMAN FOR THREE COMPANIES : WHICH LIABLE. Three railroad companies had their tracks on the same city street, and, by agreement among them, one company employed and paid a flagman at one street-crossing, another at a second, and the other (the defendant) at a third crossing. By the negligence of the flagman at the third crossing in signaling the approach of a train belonging to one of the companies which did not employ him, plaintiff 's assignor was injured. *Held* that the flagman was defendant 's servant, even when flagging a train for one of the other companies, and that defendant was liable for his negligence. *Id.*

13. CROSSING TRACKS ON STREET : COLLISION : CONTRIBUTORY NEGLIGENCE : EVIDENCE. Plaintiff 's husband was driving from the north to the south on a city street which was crossed by ten railroad tracks, and when upon the tenth or south one he was struck by a passing train and killed. It appears that he was not chargeable with any negligence until he had passed the seventh track. After passing this, he might have seen the train approaching, and possibly he did, but he drove ahead. There were engines moving upon some of the other tracks, at greater or less distances from the crossing. The train which struck him was moving nearly twice as fast as was lawful under the ordinances of the city, of which ordinance he may be presumed to have had knowledge; and the evidence made it probable that if it had been run at lawful speed he would have succeeded in crossing before its arrival, and that the collision would have been avoided. In consideration of the facts that he was in a place of danger when he was on the seventh track, and that he had to choose between going forward and turning back at that point, and that he may well have relied upon the train's being run at lawful speed, and therefore reasonably concluded that he could make the crossing in safety, *held* that he could not be said, as matter of law, to have been guilty of contributory negligence, but that the question was properly submitted to the jury. *Schmidt v. Burlington, C. R. & N. Ry. Co.*, 606.

14. ——: DUTY TO KEEP FLAGMAN: PLEADING: INSTRUCTIONS. In such case the petition stated that "the defendant, without giving any proper warning or signal of the approach of its train, and without keeping any flagman at said crossing to give warning, * * * as it was required by an ordinance duly passed," etc. *Held* that this plea was broad enough to sustain an instruction submitting to the jury the question whether under the circumstances ordinary care and prudence did not require the defendant to keep a flagman at the crossing, irrespective of any municipal regulations. *Id.*

15. COLLISION WITH HORSE AND WAGON ON DEPOT GROUNDS: CODE, SECTION 1289. Code, section 1289, providing a remedy for animals killed on railways at places where the companies have the right to fence but fail to do so, and upon depot grounds by trains operated at a speed exceeding eight miles per hour, applies only to stock running at large, and not to the case of a horse killed while being driven across the track upon the grounds of a depot. (Compare *Monahan v. Keokuk & Des M. Ry. Co.*, 45 Iowa, 523.) *Johnson v. Chicago & N. W. Ry. Co.*, 157.

16. HORSE KILLED BY TRAIN: EVIDENCE. Action to recover the value of a mare alleged to have been killed by defendant's train. The mare was found in a cattle-guard, so injured that she afterwards died. But the evidence (see opinion) failed to show that she was thrown or driven into the cattle-guard or injured by any train, but rather compelled a contrary inference. *Held* that a verdict for plaintiff should have been set aside as without any support in the evidence. *Brockert v. Central Iowa Ry. Co.*, 529.

17. INJURY TO STOCK ON RIGHT OF WAY: NEGLIGENCE: EVIDENCE. Plaintiff was driving his colts along and upon the fenced right of way of defendant's road, when some of them were killed by an approaching train. *Held* that he was guilty of palpable negligence, and that he could not recover in the absence of a showing that defendant's employes were guilty of negligence in not avoiding the injury after discovering the danger. *Davidson v. Central Iowa Ry. Co.*, 22.

18. ——: SUFFICIENCY OF FENCE. Plaintiff drove his cattle along and upon the fenced right of way of defendant's road, and took down the wires of the fence by unwrapping them from a post at which they all ended, and turned the cattle for the night into an adjacent lot where there was no pasture, and again wound the wires around the posts. That night the cattle reëntered the right of way at that place, and ten of them were killed by a passing train without negligence on the part of those in charge of it. The defendant's employes had, on the day before the cattle were turned in, found the wires unwound from the post at the same place, and securely fixed them, so that they could not be unwound by cattle; but on the morning after the accident they were found unwound, and pushed aside. *Held* that a verdict for the plaintiff could not be sustained on the ground that defendant was negligent in regard to the condition of the fence, nor on the ground that the trainmen were negligent in not sooner discovering the danger and avoiding the injury. *Id.*

19. INJURY TO CATTLE ON TRACK: CARE OF ENGINEER: INSTRUCTION: VERDICT. In an action for killing cattle on defendant's track, the court instructed that the defendant would be liable if the engineer, "in the exercise of ordinary care, could and should have prevented said accident after he actually saw the cattle on the track." The jury specially found that the engineer "might have seen the cattle sooner." *Held* that, with no other evidence of negligence on defendant's part, a verdict for plaintiff was contrary to said instruction, and could not be sustained. *Id.*

20. FAILURE TO FENCE: KILLING HORSES IN CHARGE OF DRUNKEN DRIVER. Horses hitched to a sleigh, and in charge of a driver who has become intoxicated and fallen into a drunken stupor, are not, when wandering about on the prairie, "stock running at large," within the meaning of section 1289 of the Code; and for the killing of such horses by a passing train at a place where it had the right to fence its track but did not, defendant was not liable under said section. (*Hinman v. Chicago, R. I. & P. Ry. Co.*, 28 Iowa, 494, *distinguished*). *Grove v. Burlington, C. R. & N. Ry. Co.*, 163.

21. FENCING TRACK AGAINST STOCK: SNOW-DRIFTS OVER FENCES. It is not negligence for railway companies to allow snow-drifts to remain over their fences, so that they do not serve the purpose of restraining stock from crossing over them into their right of way. *Patten v. Chicago, M. & St. P. Ry. Co.*, 452

22. DEFICIENT FENCE: STOCK KILLED: EVIDENCE UNDER INSTRUCTIONS. In an action for double the value of horses killed on defendant's track, where they were alleged to have gone by reason of a deficient fence, there was no evidence to show that they entered through the opening in the fence rather than at a deficient cattle-guard, except the fact that the last point to which they were traced was nearer to the opening than to the cattle-guard. *Held* insufficient to sustain a verdict for plaintiff on the cause of action pleaded, where the court instructed that he could not recover unless he proved that they entered through the opening. [BECK, J., *dissenting*]. *Rhines v. Chicago & N. W. Ry. Co.*, 597.

23. DUTY TO FENCE DEPOT GROUNDS: QUESTION FOR JURY. The law is that railroads are required to be fenced when it is fit, proper and suitable, in view of the public convenience; and depot grounds may be uninclosed when the interests of the road and of the public require it (*Latty v. Burlington, C. R. & M. Ry. Co.*, 38 Iowa, 250); but whether a part of depot grounds which was not the ordinary place for receiving and delivering freight, but where the freight business of a single shipper was transacted, should be left uninclosed, was a question of fact for the jury. *Id.*

24. COUPLING CARS: INJURY TO BRAKEMAN: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. Plaintiff, one of defendant's brakemen, in obedience to his conductor's orders, mounted the front end of a train of freight cars, moving backwards at the rate of about four miles per hour, and proceeded to the rear of the train, dismounted, and made a coupling with a standing car, but in doing so he was injured on account of the speed at which the train was moving. When he first mounted the train he had reason to believe that the conductor would immediately follow him, as was the custom, and slacken the speed of the train in order that the coupling might be made with safety; but when he dismounted he might, by glancing backwards, have seen that the conductor had not mounted the train at all, and, had he noticed the train as it approached him, he might have seen that its speed had not been reduced; but he testified that he was intent upon his work, and was relying on the conductor, and hence did not notice these things. *Held* that it could not be said, as matter of law, that he was guilty of contributory negligence, but that it was a question for the jury. *Henry v. Sioux City & P. Ry. Co.*, 84.

25. COUPLING CARS: DANGEROUS RATE OF SPEED: EVIDENCE: QUESTION FOR JURY. In an action by a brakeman for an injury received while coupling cars, the question whether the rate of speed of the cars was dangerous is in the nature of a conclusion to be drawn from the facts proven, and such others as are in the common knowledge of all men, and it is the duty of the jury to draw that conclusion; and while the opinions of witnesses who are qualified by their experience to express an opinion on the subject are competent evidence, they are not conclusive upon the jury, and a finding by the jury not in harmony with such opinions cannot be set aside by this court as being without warrant in the evidence. *Id.*

26. INJURY TO EMPLOYE: EVIDENCE: CROSS-EXAMINATION. In an action for an injury to a car-repairer, caused by the alleged negligent moving of a train in response to an unauthorized signal, the conductor testified that he was standing on the platform and heard the bell ring, and that it caused him to turn and face the engine. On cross-examination he was asked: "You thought that a very strange occurrence,—the bell being rung,—did you not?" and "Rather surprised you, didn't it?" To these questions defendant objected as being incompetent, immaterial and not cross-examination. *Held* that the court erred in overruling the objection, and that an affirmative answer by the witness was prejudicial. *Gadbois v. Chicago, M. & St. P. Ry. Co.*, 536.

27. ———: INSTRUCTION: EVIDENCE. In such case the court instructed that the defendant was not responsible for the conduct of a person not in its employment in giving a signal to move the train; but in another instruction the jury were told that they might consider such fact in explaining in what manner the train was moved. *Held* that the latter instruction was erroneous, because (1) such fact had no tendency to show in what manner the train was moved, and (2) it had no bearing on the material question, which was whether it was moved in a proper manner and at a proper time. And since it appears from answers to special interrogatories that the general verdict was, to some extent, at least, affected by the consideration of this fact, the error was prejudicial, and ground for reversal. *Id.*

28. INJURY TO BRAKEMAN: "WIPER" IN CHARGE OF ENGINE. Where a "wiper" has temporary charge of an engine, in making up a train, the company is liable for his negligence resulting in injury to a brakeman in coupling cars. *Whalen v. Chicago, R. I. & P. Ry. Co.*, 563.

29. ———: UNWARRANTED PROCEDURE: BURDEN OF PROOF. In an action for injury to a car-coupler, where the brakemen were in their proper places, and the usual signals given, and efforts made to couple the cars together, if the claim is made in defense that the train was being operated by unauthorized persons, or at an improper time, the burden is on defendant to prove it. *Id.*

30. ———: NEGLIGENCE: QUESTIONS FOR JURY. There being evidence, in such case, tending to show that the person in charge of the engine, when the cars were a proper distance apart to attempt to couple them, threw them together violently, the question of his negligence was properly submitted to the jury, as was also the question of plaintiff's contributory negligence in attempting to make the coupling with mittens on his hands; and their verdict cannot be set aside on appeal for want of evidence. *Id.*

31. INJURY TO BRAKEMAN: AMOUNT OF VERDICT. A verdict of twenty-three hundred dollars for an injury to a brakeman twenty-three years old, whereby he lost his right thumb and had his next two fingers permanently injured and stiffened, and his arm weakened, *held*, on appeal, not to be excessive. *Id.*

32. INJURY TO BRAKEMAN: DEFECTIVE APPLIANCES: CUSTOM NO EXCUSE. Plaintiff was one of defendant's brakemen, and he sues for injuries received on account of defendant's negligence in loading a flat-car with machinery, and placing it in the train so that his duties required him to pass over it, without providing it with a foot-board so as to make such passage safe. *Held* that there was evidence from which the jury were justified in finding that defendant was negligent in not providing a foot-board, and that the fact that such negligence was customary would not relieve defendant from liability for its consequences. *Hosic v. Chicago, R. I. & P. Ry. Co.*, 683.

33. ———: ———: ASSUMPTION OF RISK. In such case, though plaintiff knew that defendant was accustomed to have cars so loaded without providing foot-boards, it was not shown to be usual to place such cars where brakemen were required to pass over them. Therefore it could not be said that he assumed the risk by accepting the service. *Id.*

34. ———: GOING ON DANGEROUS CAR: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. In such case, even if plaintiff knew, before going upon the car loaded with machinery and not provided with a foot-board, that an attempt to pass over it would be dangerous, he could not, as matter of law, be said to be guilty of contributory negligence in going upon it, for that was a question for the jury, and depended upon the nature of his duties, the urgency of the case, and the orders of his superiors, as shown by the evidence. (See opinion for cases distinguished). *Id.*

35. STREET RAILWAYS. See Cities and Towns, 1.

36. RIGHT OF WAY: WHO ENTITLED TO DAMAGES. See Mortgages, 1.

See CARRIERS; WATER AND WATERCOURSES.

RAPE.

See ASSAULT WITH INTENT TO RAPE

REAL ESTATE.

1. ACTION TO RECOVER: NO TITLE IN PLAINTIFF. In an action to recover real estate, the plaintiff must establish title in himself, and it is not sufficient to show that the defendant has no title. *Glenn v. Jeffrey*, 20.

2. DEED: DAUGHTER TO FATHER: UNDUE INFLUENCE: RESCISSION. Courts of equity will closely scrutinize a deed made to a parent by a child who has just become of age; and in many cases the fact that a deed has been so executed is sufficient to justify a court of equity in setting it aside. (Compare *Sparger v. Hall*, 62 Iowa, 500; *Samson v. Samson*, 67 Iowa, 258). But where, as in this case, a daughter, who had only shortly before reached her majority, conveyed to her father, without consideration, land which he had some years before conveyed to her without consideration, and for the sole purpose of divesting himself, for the time being, of the legal title, it being about all the property he then owned; and he had not ceased to treat the land as his own, making improvements and paying taxes, and almost continuously occupying it personally; and the daughter was intelligent and fairly educated, and knew her rights and the value of the land, and she made the deed without any threats, promises or inducements, but because she thought that the land of right belonged to her father, *held* that the conveyance was a valid one, and could not be set aside at the suit of the daughter after she, through the influence of others, became dissatisfied with her act. *Knox v. Singmaster*, 64.

3. PARENT AND CHILD: CONVEYANCE AND RECONVEYANCE: RIGHT TO RENTS. Where a father conveys land to a minor child without consideration, but continues to occupy and use it himself, and the child, after becoming of age, reconveys it to the father, without any agreement as to the rents during the time the title was in the child, the father will be holden to the child for the reasonable rental value of the land for such time, less the amount of taxes on the land accruing during that time and paid by the father. *Id.*

4. EVIDENCE TO ASSAIL LEGAL TITLE. Evidence to establish that a deed absolute on its face was intended to be a mortgage or that the real estate described therein belongs in fact to some other person than the grantee, must be clear, satisfactory and conclusive (see cases cited in opinion), and the evidence on which defendant's title in this case is assailed is not of that character. *Ensminger v. Ensminger*, 89.

5. DEED: FATHER TO SON: UNDUE INFLUENCE: RESCISSION. An aged father, upon the loss of his wife, conveyed his farm and other property to his son in consideration of a stipulated annuity and support of himself and another for life. The contract was not unreasonable in itself, and was not dictated by the son, and the evidence failed to establish the claim that the father was incapacitated at the time to make it. Neither was it shown that the son failed to perform his part of it in good faith. It appears, however, that there was a conflict between the parties as to the quality of the support which the son was furnishing, and the father soon left the son's house and went to live with a daughter, but the other person who was to be supported was satisfied, and remained with the son. *Held* that the evidence did not warrant a rescission of the conveyance on the ground of incapacity, undue influence, and failure on the son's part to perform the contract. *Marshall v. Marshall*, 132.

6. TAX TITLE: CONVEYANCE WITH WARRANTY: FAILURE OF TITLE: TAXES PAID BY WARRANTOR: INTEREST IN LAND. Where the owner of a tax title conveys with warranty, and the title fails, but a judgment is rendered in his favor for taxes paid by him on the land, and the amount thereof is in court, and afterwards a judgment is rendered against him on his covenant of warranty, he cannot claim that he had an interest in the land to the extent of the judgment for taxes, and that he is entitled to credit for that amount on the judgment against him on the warranty. *Pierce v. Herrold*, 504.

See ADVERSE POSSESSION; CONTRACTS, 4; HIGHWAYS, 1, 2; STATUTE OF LIMITATIONS, 4; PUBLIC LANDS; TAX SALE AND DEED.

REAL-ESTATE BROKER.

ACTION FOR COMMISSION. In an action by a real-estate broker for his commission for procuring a purchaser for defendant's farm, evidence that the sale of the farm was brought about by the efforts of another agent was both competent aud material on defendant's behalf. *Newton v. Ritchie*, 91.

RECORDING INSTRUMENTS.

See CHATTEL MORTGAGES, 6, 7; TAX SALE AND DEED, 10; CORPORATIONS, 1.

REDEMPTION.

1. FROM EXECUTION SALE: SUBSEQUENT LIEN: EXTENSION OF TIME. After land had been sold on execution, but before the year for redemption had expired, certain mortgages were corrected in equity so as to cover the land. *Held* that the mortgagees had a right to redeem under the statute. (Code, sec. 3104). But since they did not avail themselves of that right, nor intimate a desire to redeem until after the year had expired and a deed had been made to the purchaser, *held* that there was no ground in equity for extending the time for redemption, even if the power to do so were conceded. *Ettenheimer v. Northgraves*, 28.

2. FROM JUNIOR MORTGAGEE WHO HAS REDEEMED FROM SENIOR FORECLOSURE: AMOUNT TO BE PAID. Where the holder of a junior mortgage, more than six and less than nine months from the date of sale under the senior mortgage, buys in the certificate of sale, and files an affidavit with the clerk, stating the amount of his lien, and that he has redeemed as a junior lien-holder, he is a redemptioner within the meaning of the statute (see *Lamb v. Feeley*, 71 Iowa, 742), and the owner of the land, with knowledge of all the facts, cannot redeem from him without paying the amount of both liens. The fact that an action is pending for the foreclosure of the junior mortgage, and that a valid defense has been pleaded thereto, makes no difference. *Lamb v. West*, 399.

3. FROM FORECLOSURE SALE: RIGHT TO RENTS DURING YEAR. See Judicial Sale, 2; WHO MAY REDEEM. See Mortgages, 3, 6.

4. FROM TAX SALE. See Tax Sale and Deed, 11.

REFERENCE.

REPORT: CONCLUSIONS OF LAW SET ASIDE: JURY TRIAL. Appellant agreed to submit her cause, on the facts and the law, to a referee, and she moved the court for the confirmation of the referee's report as a whole; but on appellees' motion the referee's conclusions of law were set aside, and the court rendered judgment on its own conclusions of law from the facts found by the referee. *Held* that appellant was not entitled, upon the setting aside of the conclusions of law, to have the cause submitted to a jury, as she would have been, under the doctrine of *Lyons v. Harris*, 73 Iowa, 292, had the findings of fact also been set aside. *In re Assignment of Hooker*, 877.

REPLEVIN.

1. OF PROPERTY SOLD BUT NOT PAID FOR: VERDICT AND JUDGMENT. Plaintiffs sold to defendant, on trial as they alleged, certain property, taking his notes for three hundred dollars, the purchase price, but no part thereof was paid. In an action to replevy the property, there was a general verdict for defendant. *Held* that it was properly set aside, because it did not determine the value of defendant's interest in the property, and no just judgment could be rendered thereon. *Peck v. Bonebright*, 98.

2. OF PROPERTY SOLD ON TRIAL AND NOT PAID FOR: DEMAND. One who sells property on trial, taking promissory notes for the purchase price, with the understanding that there is to be no completed sale until payment is made, may, upon a failure to pay the notes, maintain replevin for the property without a previous demand. *Id.*

3. JUDGMENT: INDEFINITENESS: NO PREJUDICE. A judgment in a replevin suit will not be reversed on account of indefiniteness in the description of the property where, from the whole entry, no harm could result therefrom. *Coleman v. Reel*, 304.

4. INTERVENTION: AGREEMENT TO RELEASE DEFENDANT: CONSTRUCTION. In an action for property levied upon by a constable, a third person claiming the property intervened, and it was agreed that the constable should be discharged from the case, that no judgment for damages or costs should be rendered against him, and that the property should be regarded as in the hands of the court, subject to a final determination between plaintiff and intervenor. It did not appear that the intervenor was a party to the agreement. *Held* that it did not have the effect to release plaintiff from liability to the intervenor on account of the use and detention by him of the property, which was in his hands for a long time, and at the time the agreement was made. *Van Horn v. Overman*, 421.

RES ADJUDICATA.

See FORMER ADJUDICATION.

RESCISSION.

See REAL ESTATE, 2, 5; SALES, 7.

RESIDENCE.

See CITIZENSHIP, 1; STATUTE OF LIMITATIONS, 8.

SALES.

1. OF MACHINE: DELIVERY WITHOUT AGREED PAYMENT: FAILURE TO WORK: RETURN: ACTION FOR PURCHASE PRICE. By a written executory contract plaintiffs agreed to deliver to defendants a machine, and defendants agreed, upon such delivery, to execute their notes for the purchase price. The contract contained warranties of the machine, but provided that they should be of no effect if the notes for the purchase price were not made upon delivery. The delivery was made through the plaintiffs' agent, but defendants did not then make the notes, because the agent directed them to first try the machine and see whether it was satisfactory. They found it to be worthless for the purpose for which it was made and purchased, and promptly returned it to the agent, and notified plaintiffs. In an action upon the written contract for the purchase price, *held* that, since defendants discovered, before executing the contract on their part (by making their notes), that the machine was worthless, and thereupon returned it, they were absolved from their obligation to execute the notes, and were not liable for the purchase price. *Davis v. Sweeney*, 45.

2. WRITTEN CONTRACT: INDEFINITE DESCRIPTION: PAROL TO AID. D. and Y. were partners, and as such owned a livery stock and barn, and also a stallion and a separate barn in which he was kept, and accounts due for his services. D. sold to plaintiff, describing the property in the written contract as follows: "The undivided one-half interest in the livery stock, horse, buggies, etc., of D. and Y." *Held*, in an action by plaintiff to reform the contract, and to establish his ownership thereunder of one-half of all the firm property of D. and Y., that parol evidence was admissible to show the surrounding circumstances and the conduct of the parties, and thereby apply and ascertain the meaning of its uncertain terms (*County of Des Moines v. Hinkley*, 62 Iowa, 637); and that, this being done, it appears that the word "horse" in the contract referred to the stallion, and "etc." to the barn in which he was kept and the accounts for his services; and that plaintiff was properly entitled to relief accordingly. *Shuler v. Dutton*, 155.

3. OF STOCK WITH GOOD-WILL: BREACH: EVIDENCE. Plaintiffs bought of defendant a stock of goods and the lease of the building in which the goods were kept, and they claim that defendant, at the time, and as part of the contract, agreed not to go into the same business in the same town for one year, and this action is to recover for an alleged breach of that agreement. Plaintiffs offered to prove that they would not have made the purchase but for such alleged agreement. *Held* that such evidence did not affect their right of recovery, and hence was properly excluded as immaterial. *Carruthers v. McMurray*, 178.

4. OF GRAIN TO ELEVATOR: WHAT CONSTITUTES: BAILMENT DISTINGUISHED. Plaintiffs delivered oats to H. who operated an elevator, under an alleged oral agreement that they were to remain in the elevator until plaintiffs were ready to sell them, and that H. was then to have them if he would pay as much as was paid by others; and in case he did not buy, he was to have one cent per bushel for weighing them in and out. Plaintiffs knew that the oats so delivered were mixed in a mass with others, and that H. was accustomed to ship from the mass whenever the prices suited him; and they could not have entertained the thought that the identical oats were in any case to be returned to them. *Held* that the true meaning of the contract was that H. was to have the option to pay the best market price for the oats whenever plaintiffs desired to close the transaction, or to return to them an equal quantity of similar oats; and that it was a contract of sale and not of bailment. And H. having afterwards mortgaged to defendants all the oats then in the elevator,—including, however, none of the identical oats delivered by plaintiffs,—*held* that plaintiffs could not, as against defendants, set up any claim to the mortgaged oats. (*Johnston v. Browne*, 37 Iowa, 200, *followed*, and *Sexton v. Graham*, 53 Iowa, 181, *distinguished*). *Barnes v. McCrea*, 267.

5. CONDITIONAL: FAILURE OF CONDITION: MONEY DEMAND: EVIDENCE. Where goods are sold and delivered upon an agreement to take secured notes in part payment, provided they are found upon investigation to be satisfactory, and, if not, a part of the goods to be returned or other provisions made for payment, and the notes are returned as unsatisfactory, but the goods are not returned nor payment otherwise provided for, the transaction ripens into an absolute sale, and a money demand arises for their value; and evidence of such facts is properly admitted to sustain a petition alleging an absolute sale, where it appears by the averments of the answer that the defendants will not be surprised by such evidence. *George v. Swafford*, 491.

6. SEVERABLE CONTRACT: GAMBLING: STATUTE OF ILLINOIS: PLACE OF PERFORMANCE. Defendants contracted with plaintiff 's assignor for one hundred and fifty cars of coal, to be delivered free on board cars at Chicago within a certain time, and at a certain rate per ton to be paid in thirty days; with the privilege of ordering, upon the same terms, two hundred and fifty cars more of said coal. *Held*—

   (1) That the contract was one to be performed in the state of Illinois where the coal was to be delivered, and that it was to be judged as to its validity by the laws of that state.

   (2) That the contract was severable,—the first part being a contract of actual sale, and the second part a contract for the right to purchase or not at defendant's option.

   (3) That the optional part of the contract was void under the statute of Illinois, which provides: "Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or any other commodity * * * shall be fined * * *; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." *Osgood v. Bauder*, 550.

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STATUTE OF FRAUDS.

1. LEASES: EFFECT OF PART PERFORMANCE. The fourth subdivision of section 3664 of the Code provides that no evidence of any contract for the creation or transfer of any interest in real estate, except leases for a term not exceeding one year, is competent, unless it be in writing, etc. Section 3665 provides that the rule of said fourth subdivision shall not apply "when the purchase money or any portion thereof has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract." *Held* that this last provision relates solely to contracts for the purchase or sale of real estate, and does not have the effect to qualify the rule enacted by the preceding provision as to leases for a term exceeding one year. (*Hunt v. Coe*, 15 Iowa, 197, *followed*). *Thorp v. Bradley*, 50.

2. AGREEMENT TO BUY IN MORTGAGED LAND AND CONVEY TO MORTGAGOR. An oral agreement made with the owner of mortgaged land to procure the title under a foreclosure of the mortgage, and to reconvey to the mortgagor upon being reimbursed by him, is not a mere agreement for the loan of a sum of money, but an agreement for the creation and transfer of an interest in real estate, and is within the statute of frauds. (Compare *Hain v. Robinson*, 72 Iowa, 735). *Id.*

STATUTE OF LIMITATIONS.

1. COMMENCEMENT OF ACTION: DEFECTIVE NOTICE. An original notice in an action on account was placed in the hands of the sheriff, and was duly served, May 1, 1886. On the twenty-fourth of the next month the action would have been barred by the statute of limitations. The notice was defective in that it required defendants to appear at the next August term of the circuit court, which it stated would begin on the thirtieth day of August, when in fact it began on the thirty-first day of August. At this term there was no appearance, and the cause was continued, and another notice served on defendants. *Held* that the defect in the first notice was fatal, and that the beginning of the suit dated from the time the second one was placed in the hands of the sheriff and that, therefore, the action was barred. (See cases cited in opinion). *Fernekes v. Case*, 152.

2. BREACH OF COVENANT OF SEIZIN AND OF RIGHT TO CONVEY. Covenants of seizin and of good right to convey are synonymous, and if at the time of conveyance the grantor does not own the land the covenant is broken immediately (*Brandt v. Foster*, 5 Iowa, 287–295), and a right of action at once accrues, and is barred by the statute after the lapse of ten years, under section 2529 of the Code. *Mitchell v. Kepler*, 207.

3. ACTION ON BAILMENT: WHEN IT BEGINS TO RUN. The statute of limitations will not begin to run in favor of a bailee until he denies the bailment and converts the property to his own use. Accordingly, in this case, where plaintiff deposited with defendant a watch to be repaired and for safe-keeping, and did not demand it for a period of ten years, when defendant refused to deliver it, *held* that an action for its conversion might be brought at any time within five years from the date of such demand and refusal. *Reizenstein v. Marquardt*, 294.

4. MORTGAGE: MINORS. Where the statute of limitations begins to run against the ancestor in his lifetime, it will not, in favor of his minor heirs, cease to run upon his death; the exception in favor of minors (Code, sec. 2535) applying only to causes of action which originally accrue in their favor. (*Bishop v. Knowles*, 53 Iowa, 268). And so, where the ancestor foreclosed his mortgage against the mortgagors alone, and bought in the property, not making the grantee of the mortgagors, who was in possession, a party, and then died leaving minor heirs, his right of action for foreclosure as against the mortgagors' grantee accrued before his death, and was barred as against his minor heirs in ten years after it accrued, though the minor heirs had not then attained their majority. In such case the right of action was based on the mortgage, and not upon the judgment against the mortgagors. *Grether v. Clark*, 383.

5. REVIVAL OF DEBT BY WRITTEN PROMISE. Defendant, in a letter to plaintiff, having referred to "those old notes," said: "You shall have every cent that is due on them." *Held* not sufficient to revive the debt upon a particular one of the notes which was at the time barred by the statute of limitations. *Stout v. Marshall*, 498.

6. CONTINUOUS ACCOUNT: PAYMENTS BY ASSIGNEE OF INSOLVENT. Payments made by the assignee of an insolvent, upon an account filed and allowed against his estate, are not to be regarded as made in continuation of the original account in such sense that an action against the insolvent upon the account will not be barred if brought within five years after the last of such payments. Such payments are not items of the account for that purpose. *Van Patten v. Bedow*, 589.

7. ACCOUNT; ADMISSIONS: SUBSEQUENT LAPSE OF TIME. The defendants made an assignment for the benefit of their creditors, and recognized the account sued on by including it in their sworn schedule of claims against them. *Held* that this, regarded as an admission that the debt was unpaid, or even as a new promise (which it was not), did not authorize an action upon the account more than five years after the admission or promise was made. *Id.*

8. PRESUMPTION AS TO RESIDENCE: PLEADING. It will be presumed, unless otherwise alleged, that parties to an action in this state are citizens of the state, and that the cause of action accrued in this state; and where a petition alleges nothing as to these points, but otherwise shows that the cause of action is barred by the statute of limitations, it is bad on demurrer. *Id.*

9. DOES NOT BAR EQUITABLE DEFENSE. A defendant, in an action to quiet title, may plead and rely upon his equitable title as a defense to the relief asked, even though, on account of the lapse of time, he could not plead such title as ground for affirmative relief. *Adams County v. Graves*, 642.

10. TITLE TO WILD LAND. Defendant's equitable title to the land in question, which was derived from plaintiff, arose more than ten years prior to the year 1883, but the land was during all that time wild and unoccupied. In that year, however, defendant took possession and made improvements, and soon thereafter this suit was begun to quiet title against him. *Held* that his right to have his equitable title quieted, upon a proper cross-petition for that purpose, was not barred by the statute of limitations. *Id.*

11. IN ACTIONS ON JUDGMENTS. See Practice, 10.

12. AS TO CLAIMS AGAINST ESTATES. See Estates of Decedents, 1.

13. AS TO MONEY PAID BY SURETY FOR PRINCIPAL. See Sureties, 1.

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See CITIES AND TOWNS, 1.

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See PRACTICE AND PROCEDURE IN SUPREME COURT.

SURETIES.

1. ON PROMISSORY NOTE: PAYMENT OR PURCHASE: LIMITATION OF ACTION AGAINST PRINCIPAL. A joint maker of a promissory note, who is in fact only a surety, and who pays the note, cannot maintain an action for indemnity against his principal after the lapse of five years from the date of payment; and it is the same if he purchases the note, for it is thereby extinguished as a note, and his action must be on the unwritten and implied agreement of his principal for indemnity. (See cases cited in opinion). *Harrah v. Jacobs*, 72.

2. CONSENT TO EXTENSION OF TIME: LIABILITY. A surety on a note who, after it is due, makes a payment thereon, and, acting at the instance of the principal, indorses thereon an extension of time at an increased rate of interest, does not thereby render himself liable as a principal debtor. *Hayward v. Fullerton*, 371.

3. NOTICE TO SUE: REMOVAL OF PRINCIPAL FROM STATE: DISCHARGE. Where the holder of a note neglects either to bring suit thereon, or to allow the surety so to do, when requested according to statute, the surety will be discharged, notwithstanding the principal has removed from the state. Code, secs. 2108, 2109). *Id.*

4. ON COUNTY CLERK'S BOND FOR SECOND TERM: DISCHARGE: MISREPRESENTATION OF SUPERVISORS. While it is the duty of the board of supervisors, under section 690 of the Code, to require an officer who has been reëlected to produce and account for all public funds which have come into his hands under color of his office, before approving his bond for a second term, yet a failure to perform such duty, and a false pretense by the board that it has been performed, will not discharge the sureties on the bond for the second term, after it has been accepted and approved, from liability for a defalcation occurring during that term. *Palmer v. Woods*, 402.

See PROMISSORY NOTES, 7.

TAXATION.

1. ASSESSMENT: APPEAL: CHANGE OF ISSUE BY AMENDMENT. Plaintiff was assessed by the town council upon goods and merchandise in the sum of ten thousand dollars. On appeal to the district court, it appeared that the assessment was wrongful, because he had no goods and merchandise; but the evidence showed that he might properly have been assessed that amount on account of moneys and credits. *Held* that it was error to permit defendants to amend their pleadings to conform to the evidence, and then to assess plaintiff with ten thousand dollars on moneys and credits. because the court could not try any other issue than that presented by the appeal. (See opinion for cases distinguished). *Brown v. Town of Grand Junction*, 488.

2. SPECIAL ASSESSMENT: NOTICE: WHAT SUFFICIENT. See Cities and Towns, 9.

3. OF MONEY AND CREDITS. See Insurance, 12.

4. IN AID OF RAILROADS. See Railroads, 7-10.

TAX SALE AND DEED.

1. NEWLY-ORGANIZED COUNTY: TAXES LEVIED AND DELINQUENT BEFORE ORGANIZATION. Taxes on land now in O'Brien county were levied by Woodbury county and had become delinquent while O'Brien county was yet attached to Woodbury county for revenue purposes. *Held* that a sale of the land for those taxes by O'Brien county, after its organization, was without authority and void. (*Hilliard v. Griffin*, 72 Iowa, 331, *followed*). *Collins v. Storm*, 86.

2. FATALLY DEFECTIVE DESCRIPTION. A tax deed describing the land conveyed as "the west fract. ¼ quarter of the N. W. quarter of section 7, in township 96 north, of range 41 west," is too indefinite to convey any part of the west half of said northwest quarter section; and in an action against the holder of such deed to quiet the title, without asking for a reformation of the deed, the word "quarter," when it first occurs, cannot be treated as surplusage. *Id.*

3. VOID SALE: ACTION TO QUIET TITLE: DECREE AS TO TAXES PAID AND IMPROVEMENTS. In an action to quiet the title of land against the holder of a void tax deed, where the plaintiff offers to pay defendant the taxes paid by him on the land, with six per cent. interest, a decree for plaintiff should be accompanied with an order for such payment, but, since such action is not to redeem from a valid sale, but to quiet title, the question as to compensation for improvements must be adjudicated in a subsequent action under the statute as to occupying claimants. The case is not governed by section 893 of the Code. *Id.*

4. NOTICE TO REDEEM: PERSON IN POSSESSION: WHO IS. A woman who has an interest in land sold for taxes, and who resides on it at the time the notice to redeem is given, not as having any control of the land, but simply as housekeeper for her brother, who has full control, is not a person in possession in such sense that she is entitled to have such notice served on her. [BECK, J., *dissenting.*] *Rowland v. Brown*, 679.

5. ———: DESCRIPTION OF LAND: NUMBER OF ACRES. A notice to redeem from tax sale, which was otherwise objectionable, described the land as the "N. W. ¼ of the N. E. ¼ of section thirty (30), township seventy-two (72), range twenty-four (24), 30 acres," when in fact the subdivision described contained forty acres. *Held* that the description was sufficient, because the number of acres, being inconsistent with the area as shown by the other certain description, must be rejected as surplusage, under the rule of *Ufford v. Wilkins*, 33 Iowa, 112. (See opinion for cases distinguished). *Id.*

6. ——— : PROOF OF SERVICE : ATTACHED AFFIDAVIT : COUNTY OF SERVICE OF CERTIFYING NOTARY. Where a return of service of a notice to redeem is made on the same paper, it may be verified by a proper affidavit attached and referring thereto ; it need not be on the same paper. (*Stull v. Moore*, 70 Iowa, 150 ; *Johnson v. Brown*, 71 Iowa, 609). Nor need the return show the county of service ; for that is immaterial where the service is personal. Nor is such service deficient because it does not show for what county the notary who administered the oath was qualified to act ; for of that the courts will take judicial notice. (See *Stoddard v. Sloan*, 65 Iowa, 865). *Id.*

7. NOTICE TO REDEEM : SERVICE ON TENANT. The requirement of section 894 of the Code, that a notice to redeem land from tax sale must be served upon the person in possession, in order to cut off the right to redeem, is peremptory ; so that in this case, where the notice was personally served on the owner, the only person who had the right to redeem, *held* that it did not cut off that right, because it was not also served upon his tenant in possession. (See cases cited in the opinion). [REED, J., *dissenting*]. *Bradley v. Brown*, 180.

8. NOTICE TO REDEEM : WHO ENTITLED TO : PERSON IN POSSESSION. Where at the time of giving notice to redeem land from a tax sale there was no one residing upon the land, but it was taxed to A., and C. held a contract for its purchase, but B. had a crop of corn growing on a small portion thereof, and otherwise it was not improved, *held* that service of the notice on B. was necessary to a valid tax deed ; he being in possession in contemplation of the statute, even though he was not on or near the land at the time ; and that it was immaterial whether or not he had any right to raise the corn on the land. (*Stoddard v. Sloan*, 65 Iowa, 685, *distinguished*). *Callanan v. Raymond*, 307.

9. NOTICE TO REDEEM : BY WHOM GIVEN : "HOLDER OF CERTIFICATE." Under section 894 of the Code, which provides that the notice to redeem from a tax sale shall be given by "the lawful holder of the certificate,"—when the purchaser endorses the certificate in blank and delivers it to another person with the intent thereby to transfer the property in it to such other person, such person is the "lawful holder," and is the proper person to give the notice ; no matter whether or not the assignment has been recorded in the office of the county treasurer, under section 888 of the Code. *Swan v. Whaley*, 623.

10. ASSIGNMENT OF CERTIFICATE : NOT RECORDED : WHO ENTITLED TO DEED. P. and F., partners, bought in the land at tax sale. In the settlement of their affairs, P. indorsed the certificate in blank and delivered it to F. as his property. F. gave the notice to redeem, and then sold and assigned the certificate to W. Neither of the assignments was recorded in the treasurer's office. *Held* that such recording was not necessary to entitle W. to a treasurer's deed, and that a deed to him was valid. *Id.*

11. REDEMPTION BY CONTRACT WITH HOLDER OF CERTIFICATE : RISK ASSUMED. While a mode of redeeming from tax sales is pointed out by statute, the owner of the property may effect redemption by contract with the holder of the certificate ; but if he elects to take that course he must know at his peril whether the one with whom he deals is the owner of the certificate : and the fact that no assignment is recorded is not conclusive evidence that none has been made, since the record of the assignment is not made constructive notice of the rights of the assignee. *Id.*

12. STATUTE OF LIMITATIONS: WHEN TAX TITLE NOT BARRED. A tax title is presumed to be valid, and under it the holder has constructive possession of unoccupied land, so that an entry upon it by the holder of the patent title is presumed to be a trespass, and until such entry is made the holder of the tax title has no occasion to do anything to establish his title as against the claimant under the patent title. Accordingly, where defendants had a tax title, and plaintiff, the holder of the patent title, made no claim to the land of which defendants were bound to take notice, until two days prior to the expiration of five years from the recording of their tax deed, when he took possession and made improvements, *held* that such taking possession within the five years did not estop them from claiming under their tax title after the expiration of the five years. (Compare *Francis v. Griffin*, 72 Iowa, 23, and other cases cited in opinion). *Griffin v. Turner*, 250.

13. BUYING IN ONE'S OWN LAND. Plaintiff, in an action to quiet his patent title as against defendants' tax title, insisted that defendants' tax title was invalid because, in acquiring it, they but paid the taxes on their own land. But *held* (1) that it was not shown to have been their land, and (2) that, if it were conceded to have been theirs, then plaintiff must fail, because his title was taken subject to actual notice of whatever right they had in the land. *Id.*

14. SETTING ASIDE: ADJUSTING OF EQUITIES. (*Guise v. Early*, 72 Iowa, 283, and *Buckley v. Early*, 72 Iowa, 289, *followed*). *Hunter v. Early*, 770.

TENDER.

CONDITION PRECEDENT TO ACTION. No action *at law* can be maintained for money to be paid upon the delivery of a release, unless there has first been a delivery or tender of the release. No mere offer to execute and deliver it is sufficient, even though the defendant has declared in advance that he would not accept it. (Compare *Courtright v. Deeds*, 37 Iowa, 503). In equity a different rule obtains. *Nelson v. Wilson*, 710.

TOWNSHIP TRUSTEES.

CALLED MEETINGS: NOTICE: POWER OF MAJORITY. See Railroads, 10.

TRESPASS.

1. CUTTING AND CONVERTING HAY: DAMAGES: EVIDENCE. One who without any right goes upon another's land and cuts the grass and makes it into hay and converts it to his own use, is guilty of a trespass, which continues up to and includes the final conversion of the hay; and the measure of the owner's damages is the value of the hay when converted, and not of the standing grass. And in such case, where the land lay near the town of L., which was one of the markets of the community for such products, witnesses who testified that they were acquainted with the value of hay at L., were competent to give their opinion as to the value of the hay when converted. *Id.*

2. BY RE-ENTERING ABANDONED RIGHT OF WAY. See Railroads, 5.

TRIAL.

See JURY TRIAL.

TRIAL DE NOVO.

See BOUNDARIES, 1, 3; PRACTICE IN SUPREME COURT, 8-12.

TRUSTS.

PROCEEDS OF FRAUD IN HANDS OF THIRD PARTIES. Where defendant's cashier, on his own personal account, fraudulently procured plaintiff to make to him his accommodation note, which note he negotiated for a draft, and cashed the draft as cashier of the defendant, using a part of the proceeds to pay a debt to the defendant, and for the residue taking cashier's checks, which were not negotiable, *held* that defendant, though having no actual or constructive notice of the fraud at the time the draft was cashed, would still be liable to the plaintiff for any of the proceeds of the draft remaining in its hands to the credit of the cashier; but that it could not be presumed, in the absence of proof, after the lapse of two years, that the cashier's checks had not been paid, or that there was any residue of the fund for which defendant would be liable. *Hummel v. Bank of Monroe*, 689.

See BANKS AND BANKING, 1; WILLS, 8.

ULTRA VIRES.

See CORPORATIONS, 2; COUNTIES, 1-3.

VENDOR AND VENDEE.

SALE TO CO-TENANT: CONTINUED POSSESSION AS NOTICE. A portion of the tenants in common of an estate were in possession thereof, and they purchased the interest of one of the other co-tenants who was not in possession, but the deed was not recorded. There was no visible change in the possession of the estate, but some improvements were made thereon. Afterwards a judgment was recovered against the co-tenant who had conveyed, and her original interest in the land was sold thereunder and purchased by the defendant, who had no actual knowledge of the prior conveyance. *Held* that the continued possession by the purchasing co-tenants did not, under the circumstances, charge defendant with notice of such purchase, and that defendant's title was superior to theirs. (See opinion for authorities cited). *May v. Sturdivant*, 116.

See FRAUDULENT CONVEYANCE; REAL ESTATE, 2–6.

VENUE.

1. CHANGE OF: DISCRETION OF COURT. A motion for a change of the place of trial of a civil action, on the ground of undue influence by the other party and his attorneys over the inhabitants of the county, is addressed to the discretion of the trial court, with which this court will not interfere in the absence of a showing of abuse of discretion. *Thorp v. Bradley*, 50.

2. ———: ERROR: JURISDICTION: APPEAL. If it be error to grant a change of venue for the trial of a cause, without notice to the defendant, after a default has been entered against him, such error does not affect the jurisdiction of the court to which the cause is removed, and it cannot be reviewed upon an appeal from a judgment rendered in that court. *Joerns v. La Nicca*, 705.

VERDICT.

1. DIRECTION BY COURT. See Criminal Law, 12.

2. EVIDENCE TO SUPPORT ON APPEAL. See Practice in Supreme Court, 36-39.

3. NOT SUFFICIENTLY SPECIFIC. See Replevin, 1.

VOLUNTARY ASSOCIATIONS.

See CHURCHES.

WARRANTY.

OF NOTES GIVEN IN PAYMENT. See Payment, 1.

See SALES, 1, 9.

WASTE.

INJUNCTION TO PREVENT. See Mortgages, 4.

WATER AND WATERCOURSES.

1. OBSTRUCTION BY RAILROAD: SURFACE WATER. Water which in the time of a freshet leaves the channel of a stream and spreads over the bottom-land, and is forced back into the channel again by a railroad embankment built across its course, is not to be regarded as surface water in considering the sufficiency of the culvert constructed in the embankment for the passage of the waters of the stream (*Sullens v. Chicago, R. I. & P. Ry. Co.*, 74 Iowa, 659, *followed*); and a company, about to reduce the capacity of its culvert below what the evidence shows will be sufficient to accommodate all of such water, may properly be enjoined at the suit of the owner of the land which will be damaged thereby. *Moore v. Chicago, B. & Q. Ry. Co.*, 263.

2. OBSTRUCTION: NUISANCE: INJUNCTION: REMEDY AT LAW. The obstruction of a flow of the stream, whereby lands are inundated, is a nuisance, and courts of equity may enjoin the same without averring or proving the insolvency of the defendant. (See *Bushnell v. Robeson*, 62 Iowa, 540). *Id.*

WILLS.

1. VALIDITY: UNDUE INFLUENCE; EVIDENCE. The decedent in this case, in disposing of his property by will, gave nearly all of it to a friend and his sons, giving to only one of his relatives any considerable portion, and to others of them only nominal sums. The will was made at the house of the friend, where the decedent had been taken at his own request, and where he died three days afterwards. The relatives sought to set aside the probate of the will on account of the alleged weakness of the decedent's mind at the time it was executed, and the undue influence of the friend upon him; but, upon consideration of the evidence (see opinion), *held* that the allegations of the petition were not sustained. *Malcomsen v. Graham*, 54.

2. CONSTRUCTION: RIGHT TO TAKE LAND AT APPRAISEMENT. A testator devised all his property to his seven children, share and share alike, and requested that they should partition the real estate fairly and amicably, and, if possible, that they should allow his son (the plaintiff) to have a certain forty acres; but in case they could not agree to such partition, he directed that the plaintiff should "have the first and prior right to purchase the said forty acres and improvements at the price at which it may be appraised, or at such price as can be agreed upon between him and the others." The parties could not agree upon a partition, and plaintiff brought this action to partition the land under the provisions of the will. The court appointed commissioners to appraise the land. *Held* that the will gave to plaintiff the absolute right to purchase the forty acres at its appraised value, and that the other heirs had no right to bid against him therefor. *Snyder v. Snyder*, 255.

3. CONSTRUCTION: LIFE ESTATE: ALIENATION RESTRICTED. The will in question stated that the testator had placed his son on certain land, and that he was to occupy and enjoy it during his natural life. *Held* that this was a devise to the son of a life estate, and that the right of the devisee to alienate it, and of his creditors to subject it to the payment of their demands, could not be restricted by subsequent provisions of the will; but that such provisions were void because inconsistent with the estate devised. (See opinion for authorities). *McCormick Harv. Mach. Co. v. Gates*, 343.

4. PROBATE: EVIDENCE: INCAPACITY AND UNDUE INFLUENCE: SUFFICIENCY ON APPEAL. A proceeding to probate a will is not triable *de novo* on appeal; and so, where the evidence, as in this case, was conflicting as to the alleged incapacity of the testator and the undue influence brought to bear upon him, the verdict of the jury cannot be disturbed in this court. *Primmer v. Primmer*, 415.

5. UNDUE INFLUENCE: EVIDENCE OF. While there was no direct evidence that the proponent or any one in her behalf ever urged or solicited the testator to make the will in question, yet it appeared that she married the testator when he was on the verge of the grave, and there was evidence tending to prove that the purpose of herself and her parents and relatives in procuring the marriage to be consummated was to get possession of his property after his death, and other facts which showed that they created an opportunity to consummate such purpose by controlling the circumstances of the testator and preventing conversations with his relatives, at and prior to the time when the will was made, and it appeared that she showed no sorrow at his death, but made merry with her friends before his burial. *Held* that a verdict of undue influence based on evidence of this kind could not be disturbed in this court for want of evidence to support it. *Id.*

6. CONSPIRACY TO PROCURE: EVIDENCE: DECLARATIONS OF CO-CONSPIRATOR: FOUNDATION. Before the acts or declarations of an alleged co-conspirator are admissible as against another, a foundation must first be laid by proof sufficient, in the opinion of the judge, to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact. But such evidence need not be direct; and, in the nature of the case, it must usually be circumstantial. *Id.*

7. ——: ——: SUBSEQUENT DECLARATIONS OF CO-CONSPIRATORS. The declarations of a co-conspirator, made after the accomplishment of the common design, are not usually admissible against his co-conspirators. But the declarations of one of several co-conspirators to procure the execution of a will, made after the execution of it but prior to the death of the testator, may be shown as against a co-conspirator seeking the probate of the will, because the object of the conspiracy cannot be said to be consummated until, by the death of the testator, the possibility of cancellation or modification has passed away. *Id.*

8. BEQUEST IN TRUST FOR UNINCORPORATED CHURCH: CONDITIONS: VALIDITY. A testator devised a certain sum to certain persons in trust for the benefit of the Catholic church on his farm, and directed that they or their successors should invest said money safely for the benefit of said church, and that services should be held in said church for his soul yearly. *Held*—

   (1) That the bequest was for a charitable use, clearly defined.

   (2) That the title to the money vested in the trustees, and it was immaterial that the beneficiary church was not, and could not be, incorporated.

(3) That the bequest was not invalid on the ground that there was no one to call the trustees to account for a misuse of the fund.

(4) That it was not invalid because the testator conditioned it upon services being held yearly for his soul; that paragraph of the will being simply a request rather than a condition. *Seda v. Huble*, 429.

WITNESSES.

IMPEACHMENT: WEIGHT OF EVIDENCE; INSTRUCTIONS. A witness was sought to be impeached, and six witnesses testified that his reputation for truth and veracity was bad, and nine that it was good. The court, in an instruction, said: "If you find that his credibility is sustained by as many credible witnesses as discredit his credibility, he cannot properly be held or found to be impeached." *Held* that this, standing alone, was not correct, but that, when considered with the rest of the charge, as it should be, the jury must have understood the court to mean that if not less than six of the nine witnesses who descredited the witness sought to be impeached were equally as credible as the six who testified to the contrary, then he could not be regarded as impeached; and that, so considered, the instruction was not erroneous. *Roberts v. Morrison*, 321.

See CRIMINAL LAW, 6, 14; EVIDENCE, 14–18.

WORDS AND PHRASES.

1. "COLLECTING" MONEY BY CITY TREASURER. See Cities and Towns, 7.
2. "PROPERTY." See Contracts, 9.
3. MEANING OF "RECORD" ON APPEAL. See Practice in Supreme Court, 6.
4. MEANING OF "LAWFUL HOLDER" OF TAX-SALE CERTIFICATE. See Tax Sale and Deed, 9.

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